Supreme Court, U.S.
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In The

Supreme Court of the United States

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DAVID L. PIMPER AND AMY F. PIMPER,

Petitioners,

v.

STATE OF GEORGIA, EX REL.
FRED SIMPSON, ACTING DISTRICT ATTORNEY
FOR THE ROME JUDICIAL DISTRICT,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Georgia**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. Whether the Georgia RICO Act that – unlike the federal or any other state RICO law – enables the State of Georgia to impose the criminal penalty of in personam forfeiture through the device of an *ex parte* civil forfeiture proceeding before any criminal conviction or even indictment, violates the fourth, fifth, sixth and fourteenth amendments to the United States Constitution?

2. Whether the *ex parte* in personam civil RICO forfeiture order in this case, which the State of Georgia used to seize all of the Petitioners' documents and property and then indict one of the Petitioners, violated Petitioners' procedural and substantive due process rights and their fourth amendment protection against unreasonable search and seizure?

PARTIES TO PROCEEDING BELOW

1. David L. Pimper
2. Amy F. Pimper
3. D.L. Pimper Group, Inc.
4. Wall Street Creations, Ltd.
5. State of Georgia ex rel. Fred Simpson, Acting District Attorney for the Rome Judicial District

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App., *infra,* 1-17) is reported at 555 S.E. 2d 459. The orders of the Superior Court of Floyd County, Georgia, (App., *infra,* 18-19 and 20-36) are unreported.

JURISDICTION

The Georgia Supreme Court's opinion and judgment was entered on November 19, 2001. A timely petition for rehearing was denied on December 14, 2001. (App., *infra,* 37). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 3 of the Constitution provides: "The Congress shall have Power to declare the punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. Const. art. III, § 3.

The fourth amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The fifth amendment to the Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

The sixth amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

The fourteenth amendment to the Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

The relevant provisions of the Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act, O.C.G.A. §§ 16-14-6 and 16-14-7, are reproduced at App., *infra*, 38-47.

STATEMENT

The Georgia RICO Act, specifically O.C.G.A. §§ 16-14-6 and 16-14-7, unlike the federal or any other state RICO statute, enables the State of Georgia to impose the criminal penalty of in personam forfeiture against a citizen prior to a conviction or even indictment through the device of a civil proceeding. In this case, the State of Georgia (hereinafter the "State") obtained its civil RICO in personam forfeiture order against Petitioners, Mr. and Mrs. Pimper, in an *ex parte* proceeding. There was no transcript of the State's *ex parte* encounter with the trial court, no findings of fact in the order, and no affidavits or other competent evidence in the record. Pursuant to the forfeiture order, the State immediately seized all of the Pimpers' documents and property, and later indicted Mr. Pimper.

To avoid judicial review of the unconstitutional and illegal harm caused to the Pimpers, the State purported to voluntarily dismiss the civil forfeiture action after the Pimpers appealed the order to the Georgia Supreme Court. Yet, the criminal indictment against Mr. Pimper, which tellingly contains no RICO counts and was filed five months after the initiation of the in personam forfeiture proceeding, remains pending. Notably, Amy Pimper has never been indicted and numerous constitutional rights of the Pimpers' children were violated and have not been addressed.

This case thus raises a host of novel and compelling constitutional questions concerning a state's ability to circumvent heretofore well-established constitutional safeguards and impose criminal penalties on an individual through the device of a statutory civil RICO forfeiture proceeding. If left unchecked, such an illegal proceeding could become prosecutors' preferred method for investigating and punishing alleged RICO violators – an end-around the Constitution that debilitates the accused and imposes criminal penalties under a civil standard of proof potentially even before the accused has the opportunity to be heard and defend himself.

As things now stand in Georgia, prior to indictment (and indeed, as in this case, before undertaking any independent investigation), a prosecutor can freeze all the assets of a citizen, leaving that person with no effective means to mount a defense or hire an attorney. The prosecutor can also use such a civil proceeding to conduct wholesale searches of property and review of documents without ever obtaining a warrant, thereby avoiding the fourth amendment's protections against unreasonable searches and seizures.

What happened to the Pimpers in this case should never happen to anyone in this country. The State of Georgia trampled the full panoply of the constitutional protections theoretically available to the Pimpers. Everything they owned and worked for was seized, and their reputations and livelihood irrevocably destroyed, without any notice or opportunity to be heard.

The Court normally allows the state court the first opportunity to determine the constitutionality of that state's statutes. In this case, however, despite the Pimpers' best efforts, the courts below have failed or refused to address and correct the egregious wrongs inflicted upon them. The Pimpers thus are compelled to seek relief in this Court, which undoubtedly has the jurisdiction to hear and decide the compelling federal constitutional issues presented.

The decision of the majority below to dismiss the Pimpers' appeal as moot was erroneous and in direct contravention of the record and established legal principles. In any event, the State and the courts below should not be allowed to hide behind the State's ruse in purporting to voluntarily dismiss the civil proceeding to moot the Pimpers' appeal. The voluntary cessation doctrine empowers the Court to exercise jurisdiction over this matter despite the State's mootness ploy and the Georgia Supreme Court's abdication of its responsibility to pass on the constitutionality of these provisions of the Georgia RICO Act. *See* Section III, *infra.*

A. Factual Background

In May 2000, a putative class action was commenced against David Pimper, D.L. Pimper Group, Inc. and Royal Alliance Associates, Inc., on behalf of a class of investors who participated in the D.L. Pimper Group, Inc. asset allocation program. The allegations in the complaint were based in large part on a January 19, 2000 deficiency letter issued by the United States Securities and Exchange Commission ("SEC") to D.L. Pimper Group, Inc. The crux of the allegations was not that the putative class had lost their savings (the lead plaintiff's account had grown from approximately $400,000 to over $1,000,000), but simply that the defendants were not providing the full range of services promised. Notably, this putative class action was removed to the U.S. District Court for the Northern District of Georgia, which by its order entered on or about October 30, 2001, denied class certification.

For several months after the lawsuit was filed, David and Amy Pimper continued to operate D.L. Pimper Group, Inc., and the SEC, apparently satisfied with David Pimper's written responses to the asserted deficiencies, took no further action on its January 2000 deficiency letter.

Then, on January 29, 2001, one year after the SEC issued its deficiency letter, with no warning or notice whatsoever, the District Attorney for the Rome Judicial District, acting on behalf of the State of Georgia, filed an in personam complaint under Georgia's civil RICO forfeiture statute against David Pimper, Amy Pimper, D.L. Pimper Group, Inc. and Wall Street Creations, Ltd. (both wholly owned corporations of the Pimpers). The State had undertaken no independent investigation. Rather, the allegations in the civil forfeiture complaint merely parroted the allegations from the putative class action and relied upon the one year old SEC deficiency letter.

Despite the fact that neither David nor Amy Pimper had been convicted of any crime, or even indicted, the State sought the in personam forfeiture of "all property of every kind used or intended for use in the course of, derived from, or realized through the . . . racketeering activity" as well as "any interest in real and personal property which was paid for, directly or indirectly, from the . . . racketeering activities." Compl. ¶ 33-34 (App., *infra*, 122).

Upon filing the in personam civil RICO forfeiture complaint, the State engaged in an *ex parte* hearing with the Superior Court Judge wherein the State requested the entry of an extremely broad and sweeping order seizing all of the Pimpers' property, imposing substantial restraints on their liberty and business and personal affairs, and appointing a receiver (hereinafter the "Forfeiture Order" or "Order"). The State intentionally did not give notice to the Pimpers or their counsel. (App., *infra*, 62). The Forfeiture Order recited no evidence and made no findings of fact. (App., *infra*, 20-36). No affidavits were filed and, indeed, the only "evidence" in the record is the incompetent verification of the conclusory allegations in the civil RICO forfeiture Complaint by the District Attorney, who admittedly had no personal knowledge of the facts alleged. (App., *infra*, 148). There is no transcript of the *ex parte* encounter.

The Forfeiture Order directed instantaneous action in numerous forms. (App., *infra*, 20-36). Among other things, the Order froze all of the assets and personal funds of the Pimper family, without regard to how or when acquired. (App., *infra*, 21). The Order also froze the assets of their wholly owned corporations, which were ongoing regulated businesses and which were the livelihood of the Pimpers and numerous employees. The Order purported to suspend the Pimpers' attorney-client privilege. (App., *infra*, 21-22). The Order summarily suspended the Pimpers' securities licenses, which were issued by the Commissioner of Securities of the State of Georgia. (App., *infra*, 35). The Order also intercepted delivery of the Pimpers' mail, both personal and business, and authorized the receiver to seek and utilize law enforcement agencies to assist him in seizing and marshalling the Pimpers' documents, property and other assets. (App., *infra*, 35-36).

By 5:00 p.m. on the afternoon of January 29, 2001 – the same day the Order was entered – the Pimpers' businesses had been raided and padlocked by the police, and law enforcement agencies seized the Pimpers' home to inventory and video their and their children's personal belongings. All of their personal and business accounts, credit cards, and other sources of income were seized or frozen. First thing the next morning, before any hearing, the State held a press conference to publicize its action, announce a criminal investigation, and predict the filing of criminal indictments against Mr. Pimper and possibly others. (App., *infra*, 51). By that time, the damage to the Pimpers was undeniably complete. Further proceedings could not begin to undo the irrevocable harm to the Pimpers' livelihood, reputation, and civil rights that they suffered as the result of the State's swift and ruthless actions.

B. Proceedings in the Trial Court

A hearing was set the next day in the trial court. At this hearing, the Pimpers objected to the proceedings on the ground that the *ex parte* hearing was improper and unconstitutional (App., *infra* 51-60), and that the *ex parte* in personam Forfeiture Order – coming before any criminal conviction – prevented them from presenting testimony and records to rebut the allegations. (App., *infra*, 56-59). The Pimpers filed their written motion to dissolve the Forfeiture Order and brief in support on February 5, 2001. In their papers, the Pimpers objected on the grounds that the Forfeiture Order was "overreaching, overbroad, illegal, and violative of Defendants' constitutional rights and their legal rights" (App., *infra*, 160-183), and explained:

> If the Georgia RICO Act permits the proceeding to go forward as the State has brought them without the protections built into that Act, then **the provisions of the Georgia RICO Act under which this case is brought are violative of the due process and equal protection clauses of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution on their face**. If these provisions are constitutional on their face, they have been unconstitutionally applied in this case.

(App., *infra*, 180) (emphasis added).

The trial court sought to avoid the issues presented in the Pimpers' motion to dissolve by attempting to require the Pimpers to proceed to an evidentiary hearing on a preliminary injunction, in which event the Pimpers would be forced into the Catch-22 position of having to choose between waiving their constitutional privilege against self-incrimination and forfeiting their assets and property. The Pimpers instead insisted on a ruling on the merits of their motion to dissolve the Forfeiture Order on the grounds that the Order was void *ab initio*, and that the *ex parte* proceedings, the Order itself, and the relevant provisions of the Georgia RICO Act violated numerous constitutional, statutory, and ethical provisions. (App., *infra*, 66-109).

The trial court denied the Pimpers' motion to dissolve on the merits in open court at a February 6, 2001 hearing. (App., *infra*, 107). On February 19, 2001, the court issued a written order denying the Pimpers' Motion to Dissolve on the merits, stating:

> Defendants having filed Defendants' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order, and the Court having held a hearing thereon on Tuesday, February 6th, 2001, the Court hereby denies the Defendants' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order.

(App., *infra*, 18-19).

C. The Georgia Supreme Court's Decision

After their motion to dissolve the Forfeiture Order was denied in the trial court, the Pimpers immediately appealed to the Supreme Court of Georgia. In their enumerations of error, the Pimpers asserted that the unrecorded *ex parte* hearing that led to the entry of the Forfeiture Order, the terms of the Order, and the Georgia RICO Act violated the Pimpers' constitutional rights. (App., *infra*, 229-232).

After the Pimpers filed their notice of appeal, the State purported to voluntarily dismiss the civil RICO action against the Pimpers and then moved to dismiss as moot the Pimpers' appeal. (App., *infra*, 220-224).

A majority of the Georgia Supreme Court held that the Pimpers' appeal was moot. (App., *infra*, 1-17). The Court held that "[t]he Pimpers appealed to this Court complaining that the receivership and TRO should be dissolved. Such dissolution occurred when the State's RICO action was dismissed . . . " (App., *infra*, 6). As to the constitutionality of the subject provisions of the Georgia RICO Act, the Court held that "this Court is without jurisdiction to consider the constitutional issues raised by the dissent, because the issues were not ruled upon by the trial judge after having been raised in the trial court." (App., *infra*, 7).

The trial court's oral ruling on February 6, 2001, and the plain terms of the trial court's February 19, 2001 order denying the Pimpers' motion to dissolve, however, contradict the majority's fabricated reason for not addressing the Pimpers' appeal on the merits.

Justices Hunstein and Chief Justice Fletcher of the Georgia Supreme Court dissented. The dissent "strongly disagreed" with the majority that the case was moot, stating that the issues relating to whether the *ex parte* hearing and Forfeiture Order were improper were "capable of repetition, yet evading review." As for the constitutional challenge to the Georgia RICO statute, the dissent wrote:

> I find in their enumerations challenging the receiver's actions call into question a justiciable issue directly before this Court, namely, whether an in personam forfeiture proceeding against unindicted, preconviction defendants is void from its inception.

(App., *infra*, 16).

The dissent noted that the provision of the RICO statute authorizing such proceedings "clearly does not contain any procedural safeguards within its meager provisions." (App., *infra,* 13). The dissent also warned that "there are serious constitutional ramifications when in personam proceedings are initiated against individuals who have not been indicted or convicted of any criminal activity," (App., *infra,* 11), and that "Georgia's in personam RICO forfeiture statutory scheme does not alleviate these concerns." (App., *infra,* 13).

REASONS FOR GRANTING THE PETITION

Georgia's RICO statute, unlike any other, permits the State to impose the criminal penalty of in personam forfeiture through an *ex parte* civil proceeding, prior to a conviction, or even an indictment, in contravention of numerous fundamental constitutional protections. Whether a state may constitutionally obtain in personam forfeiture through an *ex parte* civil proceeding has never been addressed by the Court. It is vitally important that this Court invalidate this unconstitutional statutory development before it is adopted by other states and before any other innocent citizens are victimized under the color of state authority in Georgia and possibly elsewhere.

Furthermore, the Court should issue a writ of certiorari to the Georgia Supreme Court to remedy the gross violations of the Pimpers' constitutional rights and prevent similar prosecutorial misconduct from occurring in the future.

Unless the questions presented are addressed by this Court, prosecutors in Georgia will remain free to utilize the Georgia RICO in personam civil forfeiture provisions without fear of recrimination and without regard to federal constitutional safeguards. Certainly, the Georgia Supreme Court cannot be counted on to correct these constitutional problems, as evidenced by that court's majority decision in this case. Moreover, the dangers manifested in this case may spread if other states feel free to amend their RICO statutes to include civil in personam forfeiture provisions. These are compelling reasons to grant this petition.

I. The provisions of the Georgia RICO Act that enable the State of Georgia to impose the criminal penalty of in personam forfeiture through the device of an *ex parte* civil RICO forfeiture proceeding violate the fourth, fifth, sixth and fourteenth amendments.

A. In personam forfeiture is a criminal penalty.

The two types of forfeiture are "in rem" and "in personam." In rem forfeiture is based on the common law fiction that property involved in a crime itself is guilty, and in rem proceedings therefore are initiated against the property itself. In personam forfeiture, on the other hand, is a criminal penalty leveled against a person convicted of a crime.

Under English law, those convicted of felonies forfeited their entire estate to the Crown, under the theory that all property belongs initially to the Crown and returns upon a breach of faith. *See* 1 Joel P. Bishop, Commentaries on the Criminal Law 382-83 (1856 ed.). The founding fathers rejected in personam forfeiture as a criminal penalty. Forfeiture of estate for treason was limited by the Constitution. U.S. CONST. art. III, § 3. In addition, the first Congress enacted 1 Stat. 112, 117 (1790), formerly codified at 18 U.S.C. § 3563, which read

"No conviction or judgment shall work corruption of blood or any forfeiture of estate."[1]

Nevertheless, in 1970, when Congress passed the federal RICO statute, 18 U.S.C. § 1961 et seq., it revived this punishment that had not been used in the United States since 1790. As the Fifth Circuit explained in *United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1990):

> The forfeiture penalty incorporated in section 1963 differs from other presently existing forfeiture provisions in federal statutes. Under other statutes, the forfeiture proceeding is in rem against the property, since the property being forfeited is itself considered the offender, and the forfeiture is no part of the punishment for the criminal offense. By enacting section 1963, however, Congress revived the concept of forfeiture as a criminal penalty against the individual, since the proceeding is in personam against the defendant and the forfeiture is part of the punishment. . . .

Id. at 813 n. 15.

Importantly, the federal RICO statute mandates that criminal liability be established prior to forfeiture. 18 U.S.C. § 1963(a); *Libretti v. United States*, 516 U.S. 29, 38-39 (1995) (forfeiture is an element of the sentence imposed following conviction or guilty plea). Most state statutes also require that criminal liability be established before the individual defendant's property can be forfeited. *See* Cal. Penal Code § 186.3(a); Conn. Gen. Stat. Ann. § 53-397; Fla. Stat. Ann. § 895.05(2)(a); Idaho Code § 18-7804(i); 725 Ill. Comp. Stat. Ann. 175/5(a); Minn.

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[1] In 1984 Congress repealed 18 U.S.C. § 3563 and replaced it with 18 U.S.C. § 3554 (1988), which permits forfeiture upon criminal conviction pursuant to RICO or the Comprehensive Drug Abuse and Control Act, 21 U.S.C. § 853 (1988).

Stat. Ann. § 609.905; Nev. Rev. Stat. Ann. 207.450; N.J. Stat. Ann. § 2C:41-3; Ohio Rev. Code Ann. § 2923.32(B)(3); Okla. Stat. Ann. tit. 22, § 1405(A); Tenn. Code Ann. § 39-12-206(j).

The question in this case – the constitutionality of pre-conviction in personam forfeiture through an *ex parte* civil proceeding – is one of first impression.

B. Georgia's in personam civil RICO forfeiture provisions.

The Georgia RICO Act provides in pertinent part:

> All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding under the following rules.

O.C.G.A. § 16-14-7(a).

The statute further provides that:

> A RICO forfeiture proceeding shall be governed by Chapter 11 of Title 9, the "Georgia Civil Practice Act," except to the extent that special rules of procedure are stated in this chapter.

O.C.G.A. § 16-14-7(b) (App., *infra*, 41).

Unlike any other RICO statute, the Georgia RICO statute also contains a clause that allows the State to impose criminal in personam penalties in this same civil forfeiture proceeding:

> In lieu of the provisions of subsections (c) through (g) of this Code Section [addressing in rem proceedings], the state may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this Code section.

O.C.G.A. § 16-14-7(m) (App., *infra*, 41).

Furthermore, the available civil remedies under the Georgia RICO Act are described in relevant part as follows:

> (a) Any superior court may, after making due provisions for the rights of innocent persons, enjoin violations of Code Section 16-14-4 by issuing appropriate orders and judgments including, but not limited to:
>
> (1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property;
>
> (2) Imposing reasonable restrictions upon the future activities or investments of any defendant including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of Code Section 16-14-4;
>
> (3) Ordering the dissolution or reorganization of any enterprise;
>
> (4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state . . .
>
> * * *
>
> (b) Any aggrieved person or the state may institute a proceeding under subsection (a) of this Code section. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunc-

> tion may be issued in any such action before a final determination on the merits.

O.C.G.A. §§ 16-14-6(a) and (b) (App., *infra,* 38-40).

While, for example, the federal RICO statute permits (in the nature of an in rem proceeding) temporary pre-conviction preservation of property that would be subject to forfeiture upon conviction under extremely limited circumstances, including the essential requirement of the filing of a federal RICO indictment or information (*see, e.g.,* 18 U.S.C. § 1963(d)), Georgia's civil RICO forfeiture provisions go far beyond temporary preservation of property and authorize permanent in personam forfeiture through a civil proceeding regardless of whether the individual is ever convicted of a crime or even indicted.

In this case, the State commenced an in personam civil RICO forfeiture proceeding against David and Amy Pimper on January 29, 2001, despite the fact that neither had been convicted of any crime, or even indicted. Furthermore, the State used the civil forfeiture proceeding as the first step in its criminal investigation, and indicted Mr. Pimper for several counts of criminal theft by deception (but, notably, not any alleged criminal RICO violations) five months after the State seized the Pimpers' documents, property and assets pursuant to the Forfeiture Order.

C. Pre-conviction in personam forfeitures violate numerous constitutional protections.

The Pimpers respectfully submit that a conviction is an essential prerequisite to the imposition of in personam forfeiture. The Court has never addressed whether the imposition of in personam forfeiture through a civil proceeding prior to a conviction violates the Constitution. It is evident that such a pre-conviction criminal penalty is fatally flawed and unconstitutional.

The imposition of the criminal penalty prior to a conviction through a civil proceeding is an affront to the protections afforded criminal defendants under the federal constitution. Such action violates the sixth amendment right to a trial by jury, as well as the due process clause of the fourteenth amendment, and improperly allows proof of crimes upon satisfaction of a standard of proof less than the standard of proof required for the imposition of criminal sanctions. U.S. CONST. amend. VI; U.S. CONST. amend. XIV.

Such proceedings and penalties also violate fourth amendment protection from unreasonable searches and seizures. U.S. CONST. amend. IV. As the dissent below explained,

> Constitutional search and seizure issues may also arise, especially in cases like this one where the alleged racketeering activity involved complex financial transactions, and the State uses the forfeiture proceedings to conduct a wholesale review of the defendants' papers, accounts, and other documents, sidestepping established constitutional procedures and protections regarding such searches and seizures.

(App., *infra*, 12).

In personam forfeiture proceedings against unconvicted citizens also violate the fifth amendment. Again, the dissent below noted:

> In personam forfeiture defendants face admitting or denying their personal involvement in the commission of racketeering activities when they file an answer . . . Other potential incriminating situations arise with the use of pre-trial discovery, such as the subpoenas issued by the State in this case to obtain the defendant's sworn testimony, and hearings on motions where, as here, the trial court's rulings are based on whether or not the defendants provided

> sworn testimony to rebut the State's racketeering allegations.

(App., *infra*, 11-12).

In *Ohio v. Reiner*, 532 U.S. 17 (2001), the Court confirmed that the fifth amendment privilege against self-incrimination is available to those who claim innocence, as long as they have "reasonable cause to apprehend danger from a direct answer." *Id.* at 21 (internal citation omitted). This Court noted that one of the fifth amendment's "basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances." *Id.* (internal citations omitted) (emphasis in original).

Under Georgia's statutory scheme, a defendant's only option to avoid forfeiture is to seek an evidentiary hearing to challenge the State's action, at which the defendant often must testify to mount an effective challenge. By doing so, such defendant would waive his privilege against self-incrimination. As the dissent explained,

> The coercive effect of that choice of proceeding placed the defendants in a Catch-22 situation whereby they could obtain the return of their seized property only by providing potentially incriminating testimony for the State to use against them in an on-going criminal investigation.

(App., *infra*, 15).

In personam forfeitures against unindicted, pre-conviction defendants also violate the sixth amendment's right to counsel and to a defense. The Georgia RICO statute allows the State to seize all property belonging to a suspected violator of RICO prior to any indictment, rendering them unable to hire attorneys. The Pimpers do note that in *Caplin & Drysdale v. United States*, 491 U.S. 617

(1989) and *United States v. Mansanto,* 491 U.S. 600 (1989), the Court held that the seizure of assets subject to possible civil forfeiture does not violate the sixth amendment. However, the present situation is fundamentally different than *Caplin & Drysdale* because, here, there was no showing of probable cause prior to the issuance of the Forfeiture Order, and because, here, the Pimpers were not indicted and therefore not even eligible for appointed counsel.

The Court cannot wait for the Georgia Supreme Court to address the constitutionality of these provisions of the Georgia RICO Act. The Pimpers recognize that this Court normally gives a state the first opportunity to address the constitutionality of that state's own statutes. However, the Georgia Supreme Court's conduct demonstrates that it is unwilling to subject these particular provisions to constitutional scrutiny. *See* Section III, *infra.*

II. The *ex parte* in personam civil RICO Forfeiture Order in this case, which the State used to seize all of the Pimpers' documents and property, and then indict Mr. Pimper, violated the Pimpers' procedural and substantive due process rights and their fourth amendment protection against unreasonable search and seizure.

Beyond the unconstitutionality of Georgia's civil RICO in personam forfeiture provisions, it is vital that the Court grant certiorari as to the second question presented in order to right the grievous wrongs inflicted on the Pimpers, and deter prosecutorial misconduct in the future.

Here, the State of Georgia used the in personam civil RICO Forfeiture Order, which it had obtained *ex parte,* to seize all of the Pimpers' documents, property and assets, and then indict Mr. Pimper. In obtaining the Forfeiture

Order, the State trampled the Pimpers' procedural and substantive due process rights by:

- intentionally deciding not to notify them or their counsel before approaching the trial court;
- obtaining the Forfeiture Order without submitting any competent evidence to support the conclusory RICO allegations or the assertion that such overbroad and sweeping emergency extraordinary relief was warranted; and then
- dismissing the in personam forfeiture proceeding and declaring it moot to avoid judicial review, but later proceeding to obtain a criminal indictment against Mr. Pimper.

Moreover, the State wrongfully used the Forfeiture Order as a prohibited general exploratory warrant, without making any showing of probable cause, in violation of the Pimpers' constitutional protection from unreasonable searches and seizures.

The State's abhorrent conduct in this matter culminated in the filing of a criminal indictment against Mr. Pimper in June 2001. That indictment, which does not include any alleged criminal RICO violations, remains pending.

A. The State's conduct in obtaining and executing the Forfeiture Order and then dismissing the case violated the Pimpers' federal procedural and substantive due process rights.

It is beyond cavil that the *ex parte* seizure violated the Pimpers' procedural due process rights as defined by this Court. By declaring the case moot as a result of the State's voluntary dismissal, the Georgia Supreme Court effectively eroded the procedural due process protections as laid out by this Court.

In *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993) (*"James Daniel"*), the Court held that, in the absence of exigent circumstances, the due process clause of the fifth amendment prohibits the federal government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard. The same principles should apply to the State in this case through the fourteenth amendment. However, the circumstances here – in particular, the overbroad authority conferred on the State by the Georgia RICO Act, the *ex parte* encounter that led to the entry of the Order, and the State's subsequent ploy to avoid judicial review by dismissing the action, threaten to undermine the *James Daniel* principles as applied to the State in this context.

The State intentionally did not notify the Pimpers or their counsel prior to the sweeping seizure of their property. The Forfeiture Order seized the Pimpers' real and intangible property, professional licenses, and reputations. It froze "all assets and property (including, without limitation, any real, personal, tangible, or intangible property) in which any Defendant holds a direct or indirect interest." (App., *infra,* 21). This asset freeze triggered the protections of due process. *See Fuentes v. Shevin,* 407 U.S. 67, 84-85 (1972) ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."). The order also deprived the Pimpers of their property interest in their securities licenses, *Barry v. Barchi,* 443 U.S. 55 (1979), as well as their reputations, *Thomas v. Harvard,* 45 F. Supp. 2d 1353 (N.D. Ga. 1999). (App., *infra,* 35).

The State failed to present any evidence of exigent circumstances prior to the seizure that would absolve it of the pre-seizure hearing requirement. The allegations in the State's complaint were taken wholesale from a complaint that had been filed seven months before. There was no evidence presented that the Pimpers had taken any action in those seven months to hide or dissipate assets. Furthermore, the seizure of property was not limited to assets that are capable of being transferred or dissipated. As in *James Daniel,* such a seizure was unnecessary and violated the Pimpers' due process rights.

Beyond this, the State disregarded the procedures mandated by the Georgia legislature that must be complied with prior to obtaining an *ex parte* order under the Georgia Civil Practice Act and the civil RICO statute. Section 9-11-65(b), O.C.G.A., establishes the procedures that must be followed prior to obtaining a temporary restraining order. (App., *infra,* 233-235). The Superior Court and the State failed to adhere to any of the procedural mandates contained within O.C.G.A. § 9-11-65(b). (App., *infra,* 233-235). There are no facts alleging, let alone proving, the immediate and irreparable harm necessary to justify proceeding without any notice to the Pimpers as required by this statute. (App., *infra,* 49-65). The State never submitted the mandatory, written certification outlining the reasons why notice was not given and should not be given. O.C.G.A. § 9-11-65(b) (App., *infra,* 49-65).

Further, the *ex parte* hearing and Forfeiture Order issued at the hearing resulted from an improper overlap of judicial and prosecutorial functions that resulted in a biased hearing, and a violation of the Pimpers' procedural due process rights. The District Attorney requested an *ex parte* proceeding and presented the Court with the Forfeiture Order prepared prior to the hearing. The Court signed the proposed Order without making any changes and made no independent findings of fact.

This improper commingling of the judicial and prosecutorial functions led to a biased hearing.

The Order also violated the Pimpers' substantive due process rights. U.S. CONST. amend. XIV. The State submitted no evidence to justify the extreme, swift and devastating unilateral action it took against the Pimpers. The State ignored and violated fundamental and mandatory constitutional, legal, and ethical rules to obtain and execute the Order, which devastated the Pimpers' reputations and livelihood. When the Pimpers appealed, the State merely dismissed the case and declared it moot. These circumstances most certainly "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Rochin v. California*, 342 U.S. 165, 169 (1952).

B. The Forfeiture Order functioned as a prohibited general exploratory warrant in violation of the Pimpers' fourth amendment rights.

The State's tactics violated the Pimpers' fourth amendment protection from unreasonable searches and seizures. U.S. CONST. amend. IV. The fourth amendment protection applies to civil proceedings and to commercial buildings as well as private dwellings. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). Warrants shall particularly describe the things to be seized and the search must be limited to that matter described. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979). General exploratory warrants are of course void. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). By definition, a general warrant is one which does not sufficiently specify the person, place, or thing to be searched. *Id.* at 480.

In this case, rather than seeking a search warrant so as to search the Pimpers' home and business, the State simply initiated in personam forfeiture proceedings and seized their property and business records *ex parte* without any showing of probable cause. Despite the fact that the State never made any probable cause showing and never obtained a search warrant, the State utilized the *ex parte* seizure to gain unfettered access to all of the Pimpers' books and records.

The Forfeiture Order directed the seizure of, among other things, "all information requested relating to the past and present operations, activities, and condition (financial, legal, or otherwise)," (App., *infra,* 27), "all keys, combinations to locks, passwords, identification numbers, and entry codes required to open or gain access to any property," (App., *infra,* 27-28), and ordered the United States postal service to deliver any and all personal or business mail to the receiver. (App., *infra,* 36). Within hours of the entry of the *ex parte* order, the police seized the Pimpers' home so as to inventory and videotape their and their children's belongings and padlocked and searched their businesses – all under the color of the Forfeiture Order. The Forfeiture Order thus amounted to a prohibited general exploratory warrant.

III. There is no procedural impediment to the Court issuing the writ of certiorari.

A. The Pimpers properly raised, and the trial court ruled upon, the federal questions before the Court, despite the Georgia Supreme Court majority opinion's fabricated conclusion to the contrary.

The majority below incorrectly held that it was without jurisdiction to hear the constitutional challenge to the Georgia RICO statute itself "because the issues were not ruled upon by the trial judge after having been raised in the trial court." (App., *infra,* 7). The dissent disagreed with the majority and stated:

> I find in their enumerations challenging the receiver's actions call into question a justiciable issue directly before this Court, namely, whether an in personam forfeiture proceeding against unindicted, preconviction defendants is void from its inception.

(App., *infra,* 16).

The record plainly shows that, contrary to the majority-decision, the Pimpers brought their federal claims to the attention of the trial court with fair precision and in due time. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928).

The in personam forfeiture proceeding against the Pimpers was initiated by the State on January 29, 2001. The very next day, the Pimpers objected to the proceedings on the ground that the *ex parte* hearing was improper (App., *infra,* 49-65), and that the in personam proceeding – coming before any criminal conviction – prevented them from presenting testimony and records to rebut the allegations. (App., *infra,* 49-65). Counsel for the Pimpers explained:

> Not only have we been deprived of records, Your Honor, but, by virtue of the announcement of the criminal investigation, we do not have the ability to bring witnesses forward who are willing to testify and risk criminal prosecution themselves or further investigation or risk waiving their privilege against self-incrimination.

(App., *infra*, 58).

Following the hearing, the Pimpers submitted a written motion to dissolve the Forfeiture Order. In that motion, they objected to the Order on the grounds that it was "overreaching, overbroad, illegal, and violative of Defendants' constitutional rights and their legal rights." (App., *infra*, 160-164). In their accompanying memorandum, the Pimpers argued:

> If the Georgia RICO Act permits the proceeding to go forward as the State has brought them without the protections built into that Act, then **the provisions of the Georgia RICO Act under which this case is brought are violative of the due process and equal protection clauses of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution on their face**. If these provisions are constitutional on their face, they have been unconstitutionally applied in this case.

(App., *infra*, 180) (emphasis added).

The trial court denied the Pimpers' motion to dissolve on the merits in open court on February 6, 2001. (App., *infra*, 107). On February 19, 2001, the court issued a written order confirming that ruling. The trial court stated:

> Defendants having filed Defendants' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order, and the Court having held a hearing thereon on Tuesday, February 6th, 2001, the Court hereby denies the

> Defendants' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order.

(App., *infra*, 18-19).

The majority's rationale thus is a fabrication, created to avoid reaching the merits of the Pimpers' appeal.

In any event, the issue whether a federal question was sufficiently and properly raised in the state court is itself a federal question, as to which the Court is not bound by the state court decision on the issue. *Street v. New York*, 394 U.S. 576, 582 (1969). The ultimate consideration is whether the record as a whole shows, either expressly or by clear intendment, that the federal claim was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928).

The Georgia Supreme Court's majority opinion abdicates that court's responsibility to protect citizens from the State's abusive unconstitutional actions and statutory provisions. This Court must step in to protect the Pimpers' federal constitutional rights and ensure that this type of statutory scheme is struck down to prevent future prosecutorial abuse in Georgia, and possibly elsewhere.

B. The Court should apply the voluntary cessation doctrine and grant certiorari to review the unconstitutional actions of the State and deter future prosecutorial misconduct.

By agreeing with the State that its voluntary dismissal rendered the case moot, the Georgia Supreme Court majority in this case left the grievous wrongs inflicted upon the Pimpers un-remedied and opened the door for future prosecutorial abuse in Georgia. This Court should apply the voluntary cessation doctrine and review the actions taken by the State so as to prevent similar prosecutorial misconduct from occurring in the future.

It would certainly be a strange doctrine that would permit the State to obtain and execute a sweeping in personam forfeiture order in an *ex parte* civil proceeding, then voluntarily dismiss that action to avoid judicial scrutiny of its actions, but retain the benefits of that order, including information and evidence that assisted the State in later obtaining a criminal indictment of the accused.

Under the voluntary cessation doctrine, the fact that the Georgia Supreme Court majority ruled the Pimpers' appeal moot does not preclude this Court from exercising jurisdiction. As the Court has explained, a state appellate court's refusal, on the ground of mootness, to consider a federal claim does not preclude the Court's independent determination of the question of mootness; that itself is a question of federal law which this Court must ultimately decide. *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

The Court has not hesitated to reverse decisions declaring an appeal moot where the government ceased offending behavior to avoid judicial review. *See Adarand Constructors, Inc. v. Slater,* 528 U.S. 216 (2000). *Adarand* involved a constitutional challenge to a federal program designed to provide federal highway contracts to disadvantaged business enterprises. The challenger sued the Department of Transportation, alleging that the program violated his right to equal protection. The District Court for the District of Colorado declared the program unconstitutional and enjoined the Department of Transportation implementing the program. *Id.* at 219. The Department of Transportation appealed the District Court's ruling to the Tenth Circuit. While the case was pending in the Tenth Circuit, the Colorado Department of

Transportation certified the challenger as a disadvantaged business enterprise. Upon learning of this development, the Tenth Circuit held that the cause of action was moot and vacated the district court's order. *Id.* at 221. The Court reversed the dismissal, explaining that:

> If this case is moot, it is because the Federal Government has accepted CDOT's certification of petitioner as a disadvantaged business enterprise, and has thereby ceased its offending conduct. Voluntary cessation of challenged conduct moots a case, however, only if it is *'absolutely* clear that the allegedly harmful behavior could not reasonably be expected to recur.'

Id. at 221-2. In *Adarand,* the Court held that it was not absolutely clear that the allegedly harmful behavior could not reasonably be expected to recur because it was not at all clear that the United States Department of Transportation would be permitted to accept Colorado's certification of the challenger as a disadvantaged business enterprise.

The facts of this case fit squarely within the Court's ruling in *Adarand*. The Georgia Supreme Court declared the appeal of the *ex parte* hearing and Forfeiture Order moot because the State ceased its offending conduct by dismissing the in personam action against the Pimpers. As in *Adarand,* however, it is not absolutely clear that the allegedly harmful behavior cannot recur. In fact, Georgia law expressly allows the State to re-file its in personam forfeiture Complaint against the Pimpers. Speaking on this issue, the dissent stated:

> While the State asserts that it has acted in the utmost good faith throughout these proceedings, both its decision to initiate in personam criminal forfeiture proceedings against these unindicted, unconvicted defendants and to dismiss the proceedings once the defendants sought appellate review thereof raises serious

> concerns about the validity of the State's actions which can only be resolved by reaching the issues on the merits.

(App., *infra*, 16-17).

This Court must step in and apply the voluntary cessation doctrine to prevent the State from violating a citizen's fundamental constitutional rights, and then avoid judicial scrutiny of its actions simply by dismissing the action and declaring the case moot after that citizen begins to fight back and the forfeiture proceeding no longer serves the State's needs.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Georgia should be granted.

Respectfully submitted.

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MARCH 14, 2002

555 S.E.2d 459

Supreme Court of Georgia.

PIMPER et al.
v.
STATE of Georgia, ex rel. SIMPSON.

No. S01A0946.

Nov. 19, 2001.
Reconsideration Denied Dec. 14, 2001.

Brinson, Askew, Berry, Seigler, Richardson & Davis, Robert M. Brinson, C. King Askew, J. Anderson Davis, Mark M.J. Webb, Rome, Alston & Bird, Theodore J. Sawicki, John H. Goselin, II, Craig H. Kuglar, Atlanta, Cook, Noell, Tolley, Bates & Michael, Athens, for appellant.

Ekonomou, Atkinson & Lambros, Andrew J. Ekonomou, Michael G. Lambros, Morris, Manning & Martin, Lewis E. Hassett, Bondurant, Mixson & Elmore, John E. Floyd, William Q. Bird, Atlanta, Smith, Price & Wright, Stephen D. Smith, Jr., Edward Hine, Jr., Rome, Fred R. Simpson, Acting Dist. Atty., Thurbert E. Baker, Atty. Gen., David S. McLaughlin, Asst. Atty. Gen., for appellee.

SEARS, Presiding Justice.

On January 29, 2001, under the authority of the Georgia RICO Act,[1] the Floyd County District Attorney filed a civil *in personam* forfeiture complaint against appellants David and Amy Pimper ("the Pimpers") and their wholly-owned corporations, D.L. Pimper Group, Inc., and Wall Street Creations, Ltd. ("the corporations"). This action was taken following investigations by both the Securities & Exchange Commission and the State. The State's complaint asserted appellants' involvement in theft, wire fraud, mail fraud, and violation of the Georgia Securities Act.[2] The complaint explained the basis for the superior court's exercise of jurisdiction, identified certain property to be forfeited, and gave detailed grounds for the forfeiture.[3]

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[1] OCGA § 16-14-1 et seq.

Also on January 29th, the District Attorney obtained an *ex parte* order from the superior court temporarily restraining appellants from transferring, concealing, assigning or disposing of all assets held in both individual and corporate capacities. Also acting *ex parte,* the trial court appointed a receiver and assigned him plenary powers to take immediate control of appellants' assets, books, and possessions; to assume sole control of the corporations; and to report to the court as to appellants' financial status. The *ex parte* hearing was not transcribed. However, at a subsequently-held hearing, the trial court made statements indicating that on January 29th, it was presented with sufficient sworn testimony and other evidence to support its entry of the TRO and appointment of the receiver.[4]

Within 24 hours of entry of the trial court's orders, on January 30, 2001, a hearing was held before the superior court at which appellants were afforded an opportunity to be heard on whether the State's forfeiture action, the court's *ex parte* appointment of a receiver, and issuance of the TRO were improper. Appellants, however, declined to give testimony or submit any evidence before the trial court, stating that they were "unable to bring witnesses forward who are willing to testify and risk criminal prosecution themselves, or further investigation, or risk waiving their privilege against self-incrimination."

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[2] OCGA § 10-5-1 et seq.

[3] See OCGA § 16-14-7(e).

[4] See *Caldwell v. State,* 253 Ga. 400, 400-01, 321 S.E.2d 704 (1984).

Six days later, on February 5, 2001, appellants filed a motion to dissolve the TRO and receivership order, alleging that the *ex parte* proceedings were improper. The following day, February 6, the superior court held a hearing on appellants' motion to dissolve, again affording appellants the opportunity to present testimony and other evidence to contest the State's civil forfeiture action. Once more, appellants offered neither sworn testimony nor evidence to the trial court. The superior court then scheduled a full evidentiary hearing on appellants' dissolution motion, to be held four days later. That hearing was delayed while appellants sought unsuccessfully to remove this matter to the federal court, and the full hearing was rescheduled for February 15, 2001. On February 13, the State notified appellants that as part of its forfeiture action, it was subpoenaing their sworn testimony and the production of documents. The next day, appellants agreed to indefinitely postpone any evidentiary hearing on their motion to dissolve the TRO and receivership due to an improper *ex parte* hearing. On February 19, 2001, no evidence having been submitted in support of appellants' motion to dissolve, the motion was denied based upon the pleadings. Appellants appealed that denial to this Court.

On February 21, 2001, the receiver reported to the trial court there were virtually no assets remaining in appellants' estates not already subject to the claims of secured creditors, many of which were asserted before the State's forfeiture action was filed. On February 22, 2001, an involuntary petition for bankruptcy was brought against one of the corporations, D.L. Pimper Group, Inc. On February 26, 2001, the other corporation, Wall Street Creations, Ltd., filed a voluntary petition for bankruptcy. On February 26 and 27, acting on the State's motion, the trial court entered orders dismissing the State's forfeiture action and the underlying TRO and receivership. The trial court reapproved its dismissal of the State's action on April 17, 2001.[5]

Thereafter, the receiver was automatically converted by operation of law into a Bankruptcy Court custodian, and thus became authorized to dispose of property in the two bankruptcy estates only in accordance with the directives of the Bankruptcy Court.[6]

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[5] Contrary to appellants' argument, the record reflects legitimate bases for the State's dismissal of its RICO action. The State's decision to dismiss was based primarily upon its discovery that the receivership estate was "both smaller and less liquid" than had been anticipated. This information was brought to light on February 21, when it was reported to the trial court that virtually no assets remained in the appellants' estates not already subject to secured claims. Two days later, the State informed the trial court that it no longer made sense to maintain the receivership, as appellants' poor financial condition rendered the receivership estate of no use in compensating the victims of appellants' purported fraudulent investment scheme. Three days later, on February 26, the State moved to dismiss its RICO action.

On June 22, 2001, the grand jury returned a 75 count indictment against David Pimper, alleging theft by deception,[7] unlawful securities practice,[8] false swearing,[9] and the making of false writings and statements.[10] On August 1, 2001, following a briefing and hearing, the Bankruptcy Court approved payment of the custodian's fees. Thereafter, the Bankruptcy Court custodian determined that $2,493.72 he had held since February 2001 was the personal property of the Pimpers, and did not belong to the estate of either of the two corporations in bankruptcy proceedings. On August 23, 2001, the Bankruptcy Court custodian sent a check in the amount of $2,493.72 to the Pimpers and their counsel. The Pimpers' counsel refused to accept the check from the Bankruptcy Court custodian. It is undisputed by the record that after the $2,493.72 was returned to the Pimpers, none of their personal assets are being held by the State as part of the now-defunct receivership. On September 26, 2001, the Bankruptcy Court custodian filed his final accountings of the estates of the two bankrupt corporations.

Insofar as this appeal concerns the bankrupt corporations, it rests within the exclusive jurisdiction of the

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[6] See 11 USC §§ 101(1)(A), 543(a).

[7] OCGA § 16-8-3.

[8] OCGA § 10-5-12.

[9] OCGA § 16-10-71.

[10] OCGA § 16-10-20.

Bankruptcy Court and is subject to the mandatory automatic stay provisions of the United States Bankruptcy Code.[11] Therefore, this appeal must be dismissed with regard to the corporations.[12]

Insofar as this appeal concerns the Pimpers in their individual capacities, it is moot. An appeal is moot when it seeks to determine an issue which, if resolved, cannot have any practical effect on the underlying controversy,[13] or when such resolution will determine only abstract questions not arising upon existing facts or rights.[14] The Pimpers appealed to this Court complaining that the receivership and TRO should be dissolved. Such dissolution occurred when the State's RICO action was dismissed in February 2001, more than six months ago. While the statutory procedures for wrapping up a receivership may not have yet been completed, it is undisputed by the record that the receivership no longer exists and currently holds no assets belonging to the Pimpers in their individual capacity.

Thus, the record shows that appellants have obtained the relief they sought in the superior court – dissolution – and the State no longer exercises dominion over their personal assets. Any resolution of the issues raised in appellant's appeal will not have a practical effect on an underlying case or controversy, and would merely address such issues in the abstract. It follows that the appeal, insofar as it concerns the Pimpers in their individual capacity, is moot. It is, of course, well established that mootness is one of the grounds for dismissal of appeals set forth in OCGA § 5-6-48(b).

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[11] 11 USC § 362; *Straton v. New,* 283 U.S. 318, 320-21, 51 S.Ct. 465, 75 L.Ed. 1060 (1931).

[12] Id.; 11 USC § 362.

[13] Black's Law Dictionary, p. 909 (5th ed.1979); see *Brown v. Spann,* 271 Ga. 495, 496, 520 S.E.2d 909 (1999).

[14] Id.

The dissent raises well-grounded concerns regarding the constitutional ramifications of an *in personam* RICO forfeiture action such as the one brought in this appeal, and urges that because these constitutional issues might reoccur and yet evade review, this appeal should not be dismissed as moot. However, this Court is without jurisdiction to consider the constitutional issues raised by the dissent, because the issues were not ruled upon by the trial judge after having been raised in the trial court.[15]

In conclusion, this Court may not exercise jurisdiction over that portion of this appeal that is now within the exclusive jurisdiction of the Bankruptcy Court, and all remaining issues are moot. Therefore, the appeal is dismissed in its entirety.

Dismissed.

All the Justices concur, except FLETCHER, C.J., and HUNSTEIN, J., who dissent.

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[15] *Alexander v. State*, 239 Ga. 810, 239 S.E.2d 18 (1977) (The Supreme Court will not pass upon the constitutionality of a statute unless it clearly appears that the point was properly raised in the trial court and was the subject matter of a ruling by the trial judge). Moreover, the unique circumstances that led to the dissolution of the receivership in this appeal, and which form the basis of our dismissal, do not demonstrate that the issues raised by the dissent are likely to evade review, should they arise in future cases.

HUNSTEIN, Justice, dissenting.

This appeal stems from an in personam RICO forfeiture complaint the Floyd County District Attorney filed against David and Amy Pimper and two corporations. The in personam nature of the complaint is incontrovertible, given the style of the complaint[1] and the recital within the complaint specifying that it was brought pursuant to OCGA § 16-14-7(m),[2] the provision in the RICO forfeiture statute which authorizes in personam forfeitures. I have grave reservations regarding the use of in personam forfeiture proceedings in a case where, as here, none of the defendants had been convicted of or even indicted for any criminal racketeering activity.[3] The use of in personam forfeiture under such circumstances raises serious concerns of constitutional dimension which I believe this Court must address and resolve.

Unlike civil in rem forfeitures, which are based on the legal fiction "that the property itself is 'guilty' of the offense," *Austin v. United States*, 509 U.S. 602, 615, 113

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[1] Naming individuals as defendants rather than designating specified property as defendant establishes that a proceeding is in personam rather than in rem. See *Cuellar v. State*, 230 Ga.App. 203, 496 S.E.2d 282 (1998).

[2] In addition to OCGA § 16-14-7(m), the complaint recites that it was brought pursuant to OCGA § 16-14-9, which provides that the "application of one civil remedy under this chapter shall not preclude the application of any other remedy, civil or criminal."

[3] According to representations in the State's brief, David Pimpér, alone among the former defendants, was indicted by the State on various RICO-related criminal charges four months *after* the dismissal of the forfeiture proceedings in issue here.

S.Ct. 2801, 125 L.Ed.2d 488 (1993), in personam forfeitures are criminal proceedings that serve to "punish the property owner's criminal conduct." Id. at 624, 113 S.Ct. 2801 (Scalia, J., concurring).[4] See also *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 684, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). In contrast, in rem forfeitures are regarded as civil in nature because the forfeiture is based upon the unlawful use of the property, irrespective of the property owner's culpability. See *United States v. Gilbert,* 244 F.3d 888, 919 (11th Cir.2001); *United States v. Seifuddin,* 820 F.2d 1074, 1076-1077 (9th Cir.1987). See also *Thorp v. State,* 264 Ga. 712(2), 450 S.E.2d 416 (1994) (statutory in rem forfeitures look to whether property has been "tainted" by unlawful use).[5] The critical distinction between in personam and in rem proceedings is also reflected in statutory law: the Federal RICO statute, 18 USC § 1963, and most criminal in personam forfeiture statutes in other jurisdictions mandate that criminal liability be established *before* the individual defendant's property can be forfeited. See id. at (e) ("[u]pon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property"); *Libretti v. United States*, 516 U.S. 29, 38-39, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995) (forfeiture is an element of the sentence imposed following conviction or a guilty plea). See also, e.g., Cal.Penal Code § 186.3(a); Conn. Gen.Stat. Ann. § 53-397(a), (b)(1); Fla. Stat. Ann. § 895.05(2)(a); Idaho Code § 18-7804(i); 725 Ill. Comp. Stat. Ann. § 175/5 (a); Minn.Stat. Ann. § 609.905; Nev.Rev.Stat. Ann. § 207.450; N.J. Stat. Ann. 2C:41-3; Ohio Rev.Code Ann. § 2923.32(B)(3); Okla. Stat. Ann. 22 § 1405(A); Tenn.Code Ann. § 39-12-206(j).[6]

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[4] For a history of the deodand and the development of forfeiture law, see *Austin v. United States,* supra, 509 U.S. at 611(III), 113 S.Ct. 2801; *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663(III), 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). See also Piety, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process, 45 U. Miami L.Rev. 911(II) (1991).

[5] Although *Murphy v. State,* 267 Ga. 120, 475 S.E.2d 907 (1996), in dicta indicates that in personam forfeiture proceedings under OCGA § 16-13-49 (drug act forfeitures) are civil actions, citing id. at (p)(4), this conclusion is erroneous. Subsection (p)(4) merely reflects that innocent third parties who have an interest in property involved in an in personam forfeiture proceeding may intervene in the proceeding by utilizing the relevant provisions in the Civil Practice Act. None of the other authority cited by *Murphy* supports its holding regarding the "civil" nature of in personam forfeitures proceedings and reliance upon *Murphy* for this holding is accordingly misplaced. See, e.g., *Cuellar v. State,* supra, 230 Ga.App. 203, 496 S.E.2d 282; *Rojas v. State,* 226 Ga.App. 688, 689, 487 S.E.2d 455 (1997).

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[6] While some jurisdictions allow the prosecuting attorney to obtain court orders that preserve the status of the property prior to indictment and conviction, the forfeiture is not completed until after conviction. E.g., Conn. Gen.Stat. Ann. § 53-398(a); Minn.Stat. Ann. § 609.907. Compare N.Y. CPLR § 1311(1)(b) (expressly authorizing pre-conviction in personam forfeiture proceedings). Some states limit this pre-indictment seizure to a period not exceeding 90 days unless good cause or a subsequent indictment is shown. Nev.Rev.Stat. Ann. § 207.440(3)(b); R.I. Gen. Laws § 7-15-3.1(b). Many jurisdictions require a special verdict to be returned by the jury regarding forfeiture proceedings. E.g., Cal.Penal Code § 186.5(c); Mich. Stat. Ann. § 750.159j (5), (7); Nev.Rev.Stat. Ann. § 207.440(3); Okla. Stat. Ann. 22 § 1405(B)(1); Ohio Rev.Code Ann. § 2923.32(B)(4).

Because of the criminal nature of in personam forfeitures, there are serious constitutional ramifications when in personam proceedings are initiated against individuals who have not been indicted or convicted of any criminal activity. Self-incrimination concerns are directly implicated. See, e.g., Guerra, Between a Rock and Hard Place: Accommodating the Fifth Amendment Privilege in Civil Forfeiture Cases, 15 Ga. State Univ. L.Rev. 555 (1999); Blum, Self Incrimination, Preclusion, Practical Effect and Prejudice to Plaintiffs: The Faulty Vision of SEC v. Graystone Nash, Inc., 61 Brooklyn L.Rev. 275 (1995).[7] In personam forfeiture defendants face admitting or denying their personal involvement in the commission of racketeering activities when they file an answer to allegations in the State's complaint.[8] Other potential incriminating situations arise with the use of pre-trial discovery, such as the subpoenas issued by the State in this case to obtain the defendants' sworn testimony, and hearings on motions where, as here, the trial court's rulings are based on whether or not the defendants provided testimony to rebut the State's racketeering allegations. Constitutional search and seizure issues may also arise, especially in cases like this one where the alleged racketeering activity involved complex financial transactions, and the State uses the forfeiture proceedings to conduct a wholesale review of the defendants' papers, accounts, and other documents, sidestepping established constitutional procedures and protections regarding such searches and seizures. See Hyman, When Rules Collide: Procedural Intersection and the Rule of Law, 71 Tul. L.Rev. 1389(II) (1997); Nelson, Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture, 80 Calif. L.Rev. 1309 (1992). Compare *Waller v. State*, 251 Ga. 124(1), 303 S.E.2d 437 (1983) (addressing constitutionality of statutory procedures involved in in rem RICO forfeiture seizures under OCGA § 16-14-7(f)). The constitutional ramifications explain why the State is sadly mistaken when it asserts that any difference between the use of in personam and in rem forfeitures is "irrelevant."[9]

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[7] While self-incrimination problems also arise in in rem forfeiture proceedings, because the proceeding is against the property the owner may elect not to file an answer at all, see, e.g., OCGA § 16-14-7(h)(1), OCGA § 16-13-49(n)(3), or may answer, contest the property's alleged guilt and prove the property is untainted without testifying or otherwise necessarily providing incriminating evidence.

[8] The case at bar serves as an example. The unindicted, preconviction defendants in this case were called upon to respond to numerous allegations regarding specified false representations the complaint claimed the defendants had made to clients regarding the "sophisticated account analyses" the corporate defendants performed as well as allegations that the defendants "unlawfully and through a pattern of racketeering activity . . . acquired and maintained, directly and indirectly, interest in and control of various enterprises, real property, personal property, and money in violation of OCGA § 16-14-4(a)," with the complaint setting forth six predicate acts in violation of various State and Federal laws which the complaint asserted constituted a "pattern of racketeering activity" by the defendants under the Georgia RICO Act.

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[9] The State's original position, as set forth in its briefs in this Court, was that the proceedings were in rem. The State corrected this error in a supplemental brief, filed September 28, 2001, but "notes that [the error is] not relevant to the merits of the case."

Georgia's in personam RICO forfeiture statutory scheme does not alleviate these concerns. OCGA § 16-14-7(m), which contains the entirety of Georgia's in personam RICO forfeiture provisions, consists solely of the following sentence: In lieu of the provisions of subsections (c) through (g) of this Code section [the in rem proceedings], the state may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this Code section.

Subsection (m) clearly does not contain any procedural safeguards within its meager provisions. Moreover, it does not even incorporate the procedural safeguards set forth in the in rem RICO forfeiture proceedings, such as subsections (e) and (f) discussed in *Waller,* supra. To the contrary, it expressly states that in personam actions operate "in lieu of" those provisions. Compare OCGA § 16-13-49(p) (setting forth minimal procedural safeguards for in personam forfeitures under the drug act). But see *Caldwell v. State,* 253 Ga. 400, 321 S.E.2d 704 (1984) (RICO forfeiture action arguably brought in personam assessed under statutory in rem procedural standards). The "amorphous and chameleon-like" nature of Georgia's RICO statute, which has been compared to "an obscure iceberg, the dim outline of its base extending seemingly forever under the waters of Georgia criminal jurisprudence," has been urged as the reason for reassessment of "the need for and effectiveness of the [Georgia RICO] in furthering the crime-fighting policies of Georgia." Kenny and Smith, A Comprehensive Analysis of Georgia RICO, 9 Ga. St. U.L.Rev. 537, 583 (1993).

In the case at bar, the Floyd County District Attorney filed an in personam forfeiture action against the Pimpers and their two corporations on January 29, 2001. That same day the State, without notice to the defendants or giving them an opportunity to be heard, obtained ex parte orders which allowed the State to seize all of the defendants' assets and place them into the hands of a court-appointed receiver. After the defendants' bank accounts were frozen and their assets, personal records and financial documents were seized, the Floyd County District Attorney announced at a press conference on January 30th that a criminal investigation into the defendants' business activities was being initiated. The defendants immediately challenged the proceedings but under the trial court's rulings, the only way they could dissolve the receivership and recover their assets was to provide sworn testimony addressing the racketeering activities they were alleged by the complaint to have personally committed, activities which were the subject matter of pending criminal investigations. In the meanwhile, the receiver withdrew over $100,000 of the defendants' seized assets to pay his expenses. The defendants filed a notice of appeal on February 19, 2001, which is the same date the written order was entered on the trial court's earlier (February 6) oral ruling denying the defendants' motion to dissolve the receivership. Less than a week thereafter, one corporate defendant was forced into involuntary bankruptcy and the other was allowed to file voluntarily. The State dismissed the forfeiture proceedings against all of the defendants even though the individual defendants, who were not affected by the bankruptcy filings, were demanding an accounting from the receiver, in order to obtain an explanation for the receiver's claim that the Pimpers' individual assets seized by the receiver amounted to less than $2,500 upon the dissolution of the receivership. It is uncontroverted that no such accounting has been rendered regarding the Pimpers' individual assets.[10] The State then challenged the appeal in this Court on the basis of "mootness."

Georgia's RICO Act has been criticized as "simply an affront to the most fundamental notions of justice." Kenny and Smith, supra, 9 Ga. St. U.L.Rev. at 583. That criticism is borne out by the Floyd County District Attorney's decision to bring an in personam criminal forfeiture proceeding against unindicted, preconviction individuals pursuant to a statute which contains absolutely no procedural safeguards to protect the constitutional rights of the defendants. The coercive effect of that choice of proceeding placed the defendants in a Catch-22 situation whereby they could obtain the return of their seized property only by providing potentially incriminating testimony for the State to use against them in an on-going criminal investigation. The State thereafter compounded the dubious nature of these proceedings by its legal maneuver in dismissing the action once appellate review was sought and then moving this Court to dismiss the appeal as moot. While the State asserts that it has acted in the utmost good faith throughout these proceedings, both its decision to initiate in personam criminal forfeiture proceedings against these unindicted, unconvicted defendants and to dismiss the proceedings once the defendants sought appellate review thereof raises serious concerns about the validity of the State's actions which can only be resolved by reaching the issues on their merits.

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[10] The filing of the final report and accounting in the bankruptcy court regarding the estates of the two corporate defendants has no relevancy to the demand made by the Pimpers for an accounting of their individual assets. A receiver has a duty to keep his accounts in a regular manner and "to be always ready with them supported by proper vouchers." OCGA § 10-6-30.

I strongly disagree with the majority opinion that we can avoid addressing the matters raised by this appeal by dismissing it as moot even though the challenges against the receiver raised by the Pimpers in their individual capacities remain viable for resolution by this Court. Although the State urges that the Pimpers are entitled to nothing more than a remand to the trial court for the receiver to submit his final report,[11] I find that their enumerations challenging the receiver's actions call into question a justiciable issue directly before this Court, namely, whether an in personam forfeiture proceeding against unindicted preconviction defendants is void from its inception. The other issues implicated by this appeal, including the potentially unconstitutional effect of in personam proceedings on the rights of unindicted, preconviction defendants, present questions capable of repetition and yet evading review through the simple expediency of the State repeating its behavior in this case by dismissing the proceedings after appellate review is sought. See generally *Collins v. Lombard Corp.,* 270 Ga. 120(1), 508 S.E.2d 653 (1998). Accordingly, because I cannot join with the majority in exonerating the State from all review of its actions in this case and would instead reach and resolve the issues on the merits, I must respectfully dissent to the majority opinion.

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[11] I find no merit in the State's argument that individuals targeted by in personam forfeiture proceedings have any adequate remedy to challenge the State's action outside an appeal in the forfeiture proceeding itself. See *Kelleher v. State of Georgia,* 187 Ga.App. 64(1), 369 S.E.2d 341 (1988) (claim against State for malicious criminal prosecution based on unfounded in rem forfeiture proceeding barred by sovereign immunity). Likewise, the State's argument that forfeiture defendants may bring actions for malicious prosecution would not avail a defendant like Amy Pimper who has not been indicted. See *Sizemore Security Intl. v. Lee,* 161 Ga.App. 332(1), 287 S.E.2d 782 (1982) (prosecution for criminal offense essential element of malicious prosecution claim).

I am authorized to state that Chief Justice FLETCHER joins in this dissent.

IN THE SUPERIOR COURT FOR THE COUNTY OF FLOYD STATE OF GEORGIA

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney For the Rome Judicial Circuit, **Plaintiffs,**	**CIVIL ACTION FILE** **NO.: 01-CV-21058-3**
vs.	
DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD., **Defendants.**	

ORDER

(Filed Feb. 19, 2001)

Defendants having filed Defendants' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order, and the Court having held a hearing thereon on Tuesday, February 6th, 2001, the Court hereby denies the Defendants' Motion to Dissolve Order appointing Receiver and Granting Temporary Restraining Order.

IT IS SO ORDERED, this 19th day of February, 2001.

/s/ Robert G. Walther
ROBERT G. WALTHER,
CHIEF JUDGE
ROME JUDICIAL CIRCUIT
FLOYD SUPERIOR COURT

Order prepared by:

/s/ J. Anderson Davis
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IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE OF GEORGIA *ex rel.* TAMI P. COLSTON, District Attorney for the Rome Judicial Circuit, Plaintiff,	CIVIL ACTION
v.	FILE NO. 01-CV-21058-3
DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, INC., and WALL STREET CREATIONS, LTD., Defendants.	

ORDER APPOINTING RECEIVER AND GRANTING TEMPORARY RESTRAINING ORDER

The Plaintiff State of Georgia *ex* rel. Tami P. Colston, District Attorney for the Rome Judicial Circuit, having applied to the Court for the appointment of a receiver in the above-styled case, and it appearing to the Court, after consideration of the verified Complaint and the evidence presented at an *ex parte* hearing on the Plaintiff's Application, that there is good and sufficient cause to appoint a receiver, to grant a temporary restraining order, and to grant other relief as prayed, it is hereby ORDERED and as follows:

I. GENERAL POWERS

ANDREW J. EKONOMOU, Esq., an attorney-at law and a member of the State Bar of Georgia, is appointed to act as receiver (the "Receiver"), with full power of an equity receiver under the laws of Georgia, for Defendants DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, Inc., and WALL STREET CREATIONS, LTD. The Receiver is hereby empowered to:

A. take and retain immediate possession, custody, and control, of all assets and property (including, without limitation, any real, personal, tangible, or intangible property) in which any Defendant holds a direct or indirect interest, which power includes the power to sell, transfer, or otherwise dispose of any such asset or property (including, without limitation, any real, personal, tangible, intangible property and the real and personal property) and, as the attorney in fact, to execute and deliver all necessary documents on behalf of any Defendant (including, without limitation, all contracts of purchase and sale, deeds, affidavits, title transfers and license transfers) in connection with the sale, transfer, or other disposal of such assets and property;

B. take and retain immediate possession, custody, and control of the books and records of the Defendants, demand inspection and turnover of the books and records of any entity in which any of the Defendants has a direct or indirect interest, and take all steps the Receiver deems necessary to secure and protect the assets and property of the Defendants including but not limited to the premises, files, and information systems of the Defendants;

C. engage and employ persons, in his discretion, to assist him, in carrying out his duties and responsibilities hereunder, including accountants, attorneys, examiners, investigators, and other experts and professionals;

D. acquire and retain all rights, powers, and privileges that the Defendants have to manage, control, operate, and maintain their businesses (including but not limited to the power to direct, hire, suspend, and terminate personnel), and to possess, receive, or use income, earnings, rents, and profits to commence, maintain, defend, or participate in legal proceedings to sue for, collect, receive and take into possession of, all goods, chattels, rights, general intangibles, choses in action, credits, movies, effects, lands, books and records of account, and other papers, including exclusive authority to make expenditures on behalf of the Defendants with a view to preventing loss, damage, and injury, and preserving assets and the records of the Defendants;

E. bring any claim or cause of action on behalf of any of the Defendants or by and through any interest that any of the Defendants may have. The Receiver may also institute, prosecute and defend, compromise, adjust, intervene in, or become a party to such actions or proceedings in state or federal court as may in the Receiver's opinion, be necessary or appropriate for the collection, marshaling, protection, maintenance, and preservation of the assets of any of the Defendants or the recovery of assets transferred by any of the Defendants. The Receiver may also do so in order to carry out of the terms of this Order (including, without limitation, any action asserting claims under applicable fraudulent transfer or partnership laws). Likewise, the Receiver has the power to defend, compromise or adjust or otherwise dispose of any or all suits, actions or proceedings instituted against the Receiver or against any of the Defendants. The Receiver may also appear in, and conduct the defense of, any suit or to adjust or compromise any actions or proceedings now pending in any court by or against Defendants where such prosecution, defense, or other disposition of any such action or proceedings will, in the judgment of the Receiver, be advisable or proper for the protection of the, assets, properties or interests of any of the Defendants, and seek any and all legal or equitable remedies afforded an equity receiver under applicable state or federal law;

F. review the records and reports of transactions by the Defendants and report to the Court any transactions that appear to be outside the ordinary course of business;

G. freeze, seize, open and close bank accounts, bank safety deposit boxes, and securities accounts in the names of any of the Defendants, (including, without limitation, any and all accounts at the First Floyd Bank, Regions Bank, AmSouth Bank, and SunTrust Bank), purchase or sell securities in any such account of any of the Defendants, and execute checks or otherwise disburse money from any bank or securities accounts of any of the Defendants to pay the obligations of such Defendant in the normal course of business, enter into such other agreements in connection with the administration, care, preservation and maintenance of the properties or assets of any of the Defendants as the Receiver may deem advisable;

H. have all the powers of the directors, officers and managers of the Defendants, whose powers and authority are hereby suspended;

I. if appropriate, file for relief and protection under the Federal Bankruptcy Code, on behalf of any or all of the Defendants or any entity controlled by any of the Defendants; and

J. take such further action as the Court shall deem equitable, just and appropriate under the circumstances upon proper application.

IT IS FURTHER ORDERED that the Receiver serves herein as an officer of this Court solely in a representative capacity and is not personally liable for any actions taken in good faith and in conformity with the duties and responsibilities set forth herein or pursuant to any statute, rule, regulation, or other legal authority.

II. REPORTING

IT IS FURTHER ORDERED that Receiver shall report to the Court and the parties by March 16, 2001, subject to extensions as may be granted by the Court, the following information for each of the Defendants (based upon the information provided and reviewed by the Receiver up and until said date):

A. all assets, liabilities, money, funds, securities, and real or personal property currently held directly or indirectly by or for the benefit of the Defendants and each of their controlled, related, or affiliated entities, including but not limited to bank accounts, brokerage accounts, investments, business interests, and real and personal property, wherever situated, identifying and describing each asset and liability, its current location and amount;

B. all money, assets, funds securities, and real or personal property received by the Defendants at any time from January 1, 1992, to the date of the accounting, describing the source, amount, disposition and current location of each of the items listed;

C. all money, assets, funds, securities, and real or personal property disbursed by any of the Defendants at any time from January 1, 1992, to the date of the accounting, describing the source, amount, and date of disbursement of each of the items listed;

D. the names, last known addresses, and account-identifying information of all financial institutions, bailees, debtors and other persons and entities that are currently holding any money, assets, funds, securities, real or personal property for the direct or indirect benefit of any of the Defendants; and

E. the Receiver shall provide similar additional reports every three 3 months from and after March 16, 2001, subject to any extensions from the Court.

III. BONDING

IT IS FURTHER ORDERED that the Receiver shall not be required to post any bond or security.

IV. FEES AND COSTS INCURRED

IT IS FURTHER ORDERED that the Defendants shall pay the reasonable costs, fees, and expenses of the Receiver incurred in connection with the performance of his respective duties described herein, including but not limited to the reasonable costs, fees, and expenses of all persons who may be engaged or employed by the Receiver to assist him in carrying out his duties and obligations. All applications for costs, fees, and expenses of the Receiver and those employed by him shall be made by application to the Court, setting forth in reasonable detail the nature of such costs, fees, and expenses. Upon approval of any such application by the Court, the Receiver may pay himself and those employed by him from the assets of the Defendants under his control. Notwithstanding anything to the contrary in this paragraph, the Receiver is authorized to pay from the receivership estate to himself and any person engaged or employed by him (including, without limitation, attorneys, accountants, and such other consultants as he may determine to be necessary) a reasonable retainer to secure payment of the costs, fees, and expenses of the Receiver or such person engaged or employed by him, such retainer to be held pending approval of such costs, fees, and expenses by the Court.

V. INDEMNIFICATION

IT IS FURTHER ORDERED that the Receiver and all persons whom he may engage or employ to assist him in carrying out his duties and obligations hereunder shall not be liable for any act or omission of the Receiver or such person, or any of their partners, employees, or agents unless it shall be proven that the Receiver or such other person acted recklessly and in bad faith. This provision shall apply to claims based on conduct during the term of any agreement that may be entered into between the Receiver and any other person who may be engaged or employed by the Receiver hereunder, even if such claims are filed after the termination of any such agreement.

VI. COOPERATION

IF [sic] IS FURTHER ORDERED that the Defendants and any entities that they control, in addition to their officers, directors, agents, servants, employees, and attorneys-in-fact and attorneys-at-law, shall:

A. transfer forthwith to the Receiver all funds, assets, and property, owned beneficially or otherwise, of the Defendants;

B. provide to the Receiver all information requested relating to the past and present operations, activities and condition (financial, legal, or otherwise) of the Defendants and shall take no action directly or indirectly, to hinder, obstruct, delay, or otherwise interfere in any manner with the actions of the Receiver or any other person engaged or employed by the Receiver to assist him in carrying out his duties and obligations herein;

C. provide to the Receiver forthwith access to, and the location of, any and all documents, books and records of accounts, financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers and check registers), client and customer lists, title documents and other papers of the Defendants; and computer files and databases in their possession, custody, or control relating to the assets of the Defendants or to the allegations of the Complaint by the Plaintiff, as may be amended, including but not limited to, documents relating to the business operations of the Defendants;

D. provide the Receiver with all keys, combinations to locks, passwords, identification numbers, and entry codes required to open or gain access to any property, computer files, safety deposit boxes, and all money or other assets deposited in or held by any financial institution to the credit of any of the Defendants wherever situated; and

E. provide the Receiver with all passwords or codes required to access any hardware, software, or electronic files on any media relating to any of the Defendants.

VII. TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that:

A. The Defendants, their creditors, officers, agents, servants, employees, attorneys-in-fact, and those persons acting in concert or participation with them who receive actual notice of this Order by personal service, facsimile service, regular mail, or otherwise ("Noticed Entities and Individuals"), are restrained and enjoined from destroying, erasing, mutilating, concealing, altering, transferring to any entity other than the Receiver or his attorneys or agents, or otherwise disposing of in any manner, directly or indirectly, any documents relating to (1) the allegations in the Complaint brought by the Plaintiff, (2) the business affairs of any of the Defendants, or (3) the assets of any of the Defendants (including, without limitation, any assets transferred by any of the Defendants). These documents include but are not limited to: books and records; audio or video tape recordings; computer tapes, discs or other computerized records (including e-mail in any form); accounting data; personal and business checks (fronts and backs); correspondence; forms; advertisements; brochures; manuals; banking records; customer lists; customer files; invoices; telephone records; ledgers; payroll records; scripts; postal receipts; appointment books; state or federal income tax returns; or other documents of any kind in their possession, custody, or control;

B. Noticed Entities and Individuals, unless directed otherwise by the Receiver, shall notify counsel for the Receiver of the receipt of any funds at all related to any of the Defendants subsequent to the date of entry of this Order, and shall identify each such receipt by the name, address, telephone number of the payer and the amount of funds received; and

C. Absent leave of the Court upon notice to the Plaintiff and the Receiver, all persons are stayed from:

1. using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, garnishment, execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon, setting off against, any property or assets owned by, or in the possession of, any of the Defendants or the Receiver, wheresoever situated;
2. attempting to modify, cancel, terminate, call, extinguish, revoke, or accelerate the due date, of any lease, loan, mortgage, indebtedness, security agreement

or other agreement with any of the Defendants; and

3. doing any act or thing whatsoever to interfere with the Receiver taking control or possession of, or managing the property and assets owned, controlled or in the possession of any of the Defendants, or in any way interfering with or harassing the Receiver, or interfering in any manner with the exclusive jurisdiction of this Court over the receivership estate.

VIII. ASSET FREEZE

IT IS FURTHER ORDERED that the Defendants and their officers, agents, servants, employees, and attorneys, and all other persons or entities directly or indirectly under their control or under common control with them, and all other persons or other entities acting in concert or participation with them, who receive actual notice of this Order by personal service or otherwise, unless agreed to by the Receiver or until further order of this Court, are hereby restrained and enjoined, from:

A. transferring, encumbering, selling, concealing, pledging, hypothecating, assigning, spending, withdrawing, disbursing, conveying, gifting, dissipating, or otherwise disposing of any funds, property, accounts, contracts, lists of customer names, shares of stock, or other assets, wherever located, that are (1) owned by, controlled by, held for the benefit of, or belong to, any Defendant, in whole or in part; (2) in the actual or constructive possession of any Defendant; or (3) held by an agent of any Defendant as a retainer for the agent's provision of services to any Defendant. The assets referenced in this subparagraph shall include, but are not limited to, any assets held by, for or under the name or alias of any Defendant at any bank or savings and loan institution, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metal dealer, or other financial institution of any kind;

B. opening or causing to be opened any safe deposit boxes titled in the name of any Defendant, or subject to access by any Defendant; and

C. incurring charges or cash advances on any credit card issued in the name, singly or jointly, of any Defendant; or for which any Defendant is obligated.

D. The assets affected by this Section shall include both existing assets and assets acquired after the effective date of this Order, including, without limitation, those acquired by loan or gift, and assets in the form of retainers paid to Defendants' agents or compensation for the provision of services to Defendants. Any Defendant or any third party holding assets on behalf of or for the benefit of any Defendant, who receives actual notice of this Order, by personal service, telecopier, regular mail, or otherwise, shall hold such assets, including without limitation, payments, loans and gifts, received after service of this Order, and shall provide written notice to the Receiver setting forth the description of such assets being held.

IX. RETENTION OF ASSETS AND RECORDS BY THIRD PARTIES

IT IS FURTHER ORDERED that, other than by agreement of the Receiver, any financial or brokerage institution, escrow agent, title company, commodity trading company, common carrier, storage company, trustee, or any person or other entity who received any funds from any of the Defendants who are served with a copy of this Order, by personal service, telecopier or regular mail, pending written instructions by the Receiver, shall:

A. deny access, other than to the Receiver, to any safe deposit boxes that are either:

1. titled in the name, individually or jointly, of any Defendant(s) or other party subject to this Order; or
2. subject to access by any Defendant(s) or other party subject to this Order; and

B. provide to the Receiver, within four (4) business days after service of this Order, a statement setting forth:

1. the identification of each account or asset titled in the name, individually or jointly, or held on behalf of, or for the benefit of, any Defendant(s) or other party subject to this Order, whether in whole or in part;
2. the balance of each such account asset, or a description of the nature and value of such account or asset;
3. the identification of any safe deposit box that is either titled in the name of, individually or jointly, or is otherwise subject to access or control by, any

Defendant(s) or other party subject to this Order, whether in whole or in part; and

4. if the account, safe deposit box, or other asset has been closed or removed since January 1, 1992, the date closed or removed and the balance on said date.

IF [sic] IS FURTHER ORDERED that this section shall not prohibit transfers in accordance with any provision of this Order, or any further order of the Court. The Receiver may serve this Order on any bank, savings and loan institution, credit union, financial institution, brokerage house, escrow agent, title company, commodity trading company, common carrier, storage company, trustee or any person or entity.

X. RECEIVER'S RIGHT TO TAKE EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that in light of the need to monitor compliance with and in furtherance of, the powers granted to the Receiver hereunder, the Receiver is hereby granted leave to conduct certain expedited discovery, and that, commencing with the time and date of this Order, in lieu of the time periods, notice provisions, and other requirements of Sections 26, 30, 34, 45 of the Georgia Civil Practice Act, expedited discovery shall proceed as follows:

A. Pursuant to Section 30 of the Georgia Civil Practice Act, the Receiver may take depositions upon oral examination concerning the nature, location, status, and extent of Defendants' assets; the status and location of documents reflecting Defendants' business transactions;

and compliance with this Order, on three (3) days notice of any such deposition.

This subsection shall not be construed in any manner to preclude the right of the Receiver, or any party to the litigation, to take subsequent depositions of the same witnesses on the merits of these actions; and any deposition taken pursuant to this subsection is in addition to, and not subject to, the presumptive limits on depositions set forth in Section 30(a)(2)(A) of the Georgia Civil Practice Act.

B. Pursuant to Section 34(b) of the Georgia Civil Practice Act, within two (2) days of service of a request by the Receiver, Defendants shall produce all documents requested by the Receiver concerning: (1) the nature, location, status, and extent of Defendants' assets; (2) the status and location of documents reflecting Defendants' business transactions; and (3) Defendants' compliance with this Order, with production of documents made at such place as the Receiver may direct in writing.

C. The Receiver shall also have subpoena powers and may take depositions, obtain the production of documents, and take discovery by all means authorized by the Georgia Civil Practice Act, upon three (3) days notice by facsimile or otherwise.

XI. IMMEDIATE ACCESS TO DEFENDANTS' BUSINESS PREMISES

IT IS FURTHER ORDERED that the Defendants, each of them, and any other person served with a copy of this Order, shall permit the Receiver immediate access to the business premises and facilities of any of the Defendants, wherever they may be situated, as well as all branch offices, storage facilities, and any premises (or portions thereof) used for, or in connection with, the business of any of the Defendants, or the marketing of any of their products or services, provided that said offices, facilities, and premises are owned, leased and occupied, or controlled by any of the Defendants.

XII. CREDIT REPORT PROVISION

IT IS FURTHER ORDERED that the Receiver may obtain credit reports concerning any of the Defendants, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681 b(1), and that upon written request, any credit reporting agency from which such reports are requested shall provide them to the Receiver.

XIII. SUSPENSION OF LICENSES AND PERMITS

Any and all licenses, permits, or authorizations issued to any of the Defendants by the Commissioner of Securities of the State of Georgia pursuant to the Georgia Securities Act of 1973, as amended, including without limitation any licenses to act as securities salespersons and investment advisers, are hereby SUSPENDED until further Order of this Court, and the Receiver is directed to notify the Commissioner of Securities of such suspensions.

XIV. ASSISTANCE TO RECEIVER

IT IS FURTHER ORDERED that the Receiver is authorized to seek and utilize the assistance, services, instrumentalities, and facilities of any and all law enforcement agencies, officials and personnel, including without limitation the Office of the Sheriff of Floyd County, Georgia, in implementing the provisions of this Order and in executing the duties and responsibilities imposed upon him hereunder.

XV. DELIVERY OF UNITED STATES MAIL TO RECEIVER

IT IS FURTHER ORDERED that the United States Postal Service shall deliver to the Receiver any and all mail belonging and/or addressed to any of the Defendants at the following addresses:

(a) Post Office Box 5541, Rome, Georgia 30162;

(b) 501 East First Street, Rome, Georgia 30161;

(c) 488 Sproull Road, S.E., Rome, Georgia 30161.

XIV. [sic] RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

SO ORDERED this 29th day of January, 2001. 2:35 P.M

/s/ Robert S. Walker
Judge, Superior Court
of Floyd County
Rome Judicial Circuit

Presented by:

/s/ Tami Colston
TAMI P. COLSTON
District Attorney

SUPREME COURT OF GEORGIA

Case No. S01A0946 Atlanta, December 14, 2001

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

DAVID L. PIMPER et al. v. STATE OF GEORGIA, ex rel. FRED L Acting District Attorney

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, C. J., and Hunstein, J., dissent.

SUPREME COURT OF THE STATE OF GEORGIA

[illegible]

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[illegible]

O.C.G.A. Stat.
16-14-6 Available civil remedies.

(a) Any superior court may, after making due provisions for the rights of innocent persons, enjoin violations of Code Section 16-14-4 by issuing appropriate orders and judgments including, but not limited to:

(1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property;

(2) Imposing reasonable restrictions upon the future activities or investments of any defendant including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of Code Section 16-14-4;

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; or

(5) Ordering the forfeiture of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within this state upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of Code Section 16-14-4 and that, for the prevention of future criminal activity, the public interest requires that the charter of the corporation be forfeited

and that the corporation be dissolved or the certificate be revoked.

(b) Any aggrieved person or the state may institute a proceeding under subsection (a) of this Code section. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

(d) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state or the county (other than for costs) has in the same property or proceeds. To enforce such a claim, the injured person must intervene in the forfeiture proceeding prior to its final disposition.

(e) A conviction in any criminal proceeding under this chapter shall estop the defendant in any subsequent civil action or proceeding as to all matters proved in the criminal proceeding.

O.C.G.A. Stat.
16-14-7 Forfeiture proceedings.

(a) All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding under the following rules.

(b) A RICO forfeiture proceeding shall be governed by Chapter 11 of Title 9, the "Georgia Civil Practice Act," except to the extent that special rules of procedure are stated in this chapter.

(c) A RICO forfeiture proceeding shall be an in rem proceeding against the property.

(d) A RICO forfeiture proceeding shall be instituted by complaint and prosecuted by the district attorney of the county in which the property is located or seized. The proceeding may be commenced before or after seizure of the property.

(e) If the complaint is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of the court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine ex parte whether there is reasonable cause to believe that the property is subject to forfeiture and that notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property. If the court finds that reasonable cause does not exist to believe the property is subject to forfeiture, it shall dismiss the complaint.

If the court finds that reasonable cause does exist to believe the property is subject to forfeiture but there is not reasonable cause to believe that prior notice would result in loss or destruction, it shall order service on all persons known to have or claim an interest in the property prior to a further hearing on whether a writ of seizure should issue. If the court finds that there is reasonable cause to believe that the property is subject to forfeiture and to believe that prior notice would cause loss or destruction, it shall without any further hearing or notice issue a writ of seizure directing the sheriff of the county where the property is found to seize it.

(f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within a reasonable time after receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

(g) After the complaint is filed or the seizure effected, whichever is later, every person known to have or claim an interest in the property shall be served, if not previously served, with a copy of the complaint and a notice of seizure in the manner provided by Chapter 11 of

Title 9, the "Georgia Civil Practice Act." Service by publication may be ordered upon any party whose whereabouts cannot be determined.

(h)(1) Any person claiming an interest in the property may become a party to the action at any time prior to judgment whether named in the complaint or not. Any party claiming a substantial interest in the property may upon motion be allowed by the court to take possession of the property upon posting bond with good and sufficient security in double the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interest of another not subject to forfeiture. Such a party taking possession shall not remove the property from the territorial jurisdiction of the court without written permission from the court.

(2) The court may, upon such terms and conditions as prescribed by it, order that the property be sold by an innocent party who holds a lien on or security interest in the property at any time during the proceedings. Any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest shall be paid into court pending final judgment in the forfeiture proceeding. No such sale shall be ordered, however, unless the obligation upon which the lien or security interest is based is in default.

(3) Pending final judgment in the forfeiture proceeding, the court may make any other disposition of the property which is in the interest of substantial justice.

(i) After service of process, all further proceedings shall be as provided in Chapter 11 of Title 9, the "Georgia

Civil Practice Act," except that any party may bring one motion to dismiss at any time and such motion shall be heard and ruled on within ten days. Any party may demand a jury trial.

(j) The interest of an innocent party in the property shall not be subject to forfeiture. An innocent party is one who did not have actual or constructive knowledge that the property was subject to forfeiture.

(k) Subject to the requirement of protecting the interest of all innocent parties, the court may, after judgment of forfeiture, make any of the following orders for disposition of the property:

(1) Destruction of contraband, the possession of which is illegal;

(2) Retention for official use by any agency of this state or any political subdivision thereof. When such agency or political subdivision no longer has use for such property, it shall be disposed of by judicial sale;

(3) Transfer to the Department of Archives and History of property useful for historical or instructional purposes;

(4) Retention of the property by any innocent party having an interest therein, upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property. The plan may include, in the case of an innocent party who holds a lien on or security interest in the property, the sale of the property by the innocent party under such terms and conditions as may be prescribed by the court and the payment into court of

any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest;

(5) Judicial sale of the property;

(6) Transfer of the property to any innocent party having an interest therein equal to or greater than the value of the property; or

(7) Any other disposition of the property which is in the interest of substantial justice and adequately protects innocent parties.

(l) The net proceeds of any sale or disposition after satisfaction of the interest of any innocent party, less the greater of one-half thereof or the costs borne by the county in bringing the forfeiture action, shall be paid into the general fund of the state treasury. The costs borne by the county or one-half of the net proceeds of sale or disposition, whichever is greater, shall be paid into the treasury of the county where the forfeiture action is brought. Notwithstanding any other provision in this Code section, the court may, after satisfaction of the interest of any innocent party, make any other division of the proceeds among the state, county, or municipalities or agencies of the state, county, or municipalities, which is commensurate with the proportion of the assistance that each contributed to the underlying criminal action, forfeiture, or criminal action and forfeiture.

(m) In lieu of the provisions of subsections (c) through (g) of this Code section, the state may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this Code section.

(n)(1) Upon the entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property shall:

(A) In the case of real property or beneficial interest, relate back to the date of filing of the RICO lien notice in the official records of the county where the real property or beneficial trust is located and, if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens under Article 9 of Chapter 14 of Title 44 in the official records of the county where the real property or beneficial interest is located and, if no RICO lien notice or notice of lis pendens is so filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located; and

(B) In the case of personal property, relate back to the date the personal property was seized by the investigating agency.

(2) If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a civil proceeding or criminal proceeding, whichever is earlier, the investigative agency may, on behalf of the state, institute an action in the appropriate superior court against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding; and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees

incurred by the investigative agency in the action. If a civil proceeding is pending, such action shall be filed only in the court where such civil proceeding is pending.

O.C.G.A. Stat.
16-14-5 Criminal penalties for violation of Code Section 16-14-4.

(a) Any person convicted of the offense of engaging in activity in violation of Code Section 16-14-4 is guilty of a felony and shall be punished by not less than five nor more than 20 years' imprisonment or the fine specified in subsection (b) of this Code section, or both.

(b) In lieu of any fine otherwise authorized by law, any person convicted of the offense of engaging in conduct in violation of Code Section 16-14-4 may be sentenced to pay a fine that does not exceed the greater of $25,000.00 or three times the amount of any pecuniary value gained by him from such violation.

(c) The court shall hold a hearing to determine the amount of the fine authorized by subsection (b) of this Code section.

(d) For the purposes of subsection (b) of this Code section, "pecuniary value" means:

(1) Anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else, the primary significance of which is economic advantage; or

(2) Any other property or service that has a value in excess of $100.00.

IN THE SUPERIOR COURT FOR THE
COUNTY OF FLOYD
STATE OF GEORGIA

STATE OF GEORGIA ex rel.
TAMI P. COLSTON, District
Attorney for the Rome Judicial
Circuit,

Plaintiff,

CIVIL ACTION
FILE NO.:
01CV-21058-3

vs.

DAVID L. PIMPER, AMY F.
PIMPER, D.L. PIMPER
GROUP, INC., and WALL
STREET CREATIONS, LTD.,

Defendants.

HEARING ON EX PARTE ACTION OF THE COURT
(Pages 1 through 20)

TRANSCRIPT OF PROCEEDINGS
Before The Honorable
ROBERT G. WALTHER, Judge, on
Tuesday, January 30, 2001

APPEARANCES OF COUNSEL:

For the Plaintiff:

Ms. Tami Colston
District Attorney
Floyd County Courthouse
Rome, Georgia 30161

For the Defendants:
Mr. C. King Askew
Mr. Bob Berry
Mr. Mark M.J. Webb
Brinson, Askew, Berry, Seigler,
Richardson & Davis
Rome, Georgia 30161

Mr. Theodore J. Sawicki
Mr. John H. Goselin II
Alston & Bird, LLP
Atlanta, GA 30309

FAY FRANKLAND, C.C.R.
OFFICIAL COURT REPORTER
FLOYD COUNTY COURTHOUSE, SUITE 214
ROME, GEORGIA 30161

[2] [Rome, Floyd County, Georgia; Tuesday, January 30, 2001; 12:00 noon; in open court:]

DEPUTY SHERIFF: All rise. Court is now in session, the Honorable Robert G. Walther presiding.

THE COURT: Thank you very much. Be seated.

We're here today at the request of the counsel for the defendants. There was an ex parte order entered by the Court yesterday in connection with the matter now under consideration, and, when I was called and asked for a hearing, I told them we would set it today at twelve o'clock, and this will not be a temporary hearing. This is just on the issue of the ex parte action that the Court took.

For the sake of having some kind of order, I think I'll hear from the defendants as to the their grounds of their objection, and, then, I can hear the response from the State.

Let me tell you, I don't mean to limit you in any way and I don't know how long you would expect to be proceeding on this matter, but I will tell you that I can go with you until one o'clock, and, then, I'm going to adjourn the hearing, if we're not completed at that time, until late this afternoon, and I'll pick it up there, then I'll stay with you as long as y'all want to stay.

All right. Who is going to proceed for the [3] defendant?

MR. ASKEW: Your Honor, if I may, first of all, Your Honor, certainly you know me and – and Bob Berry. I – I want to introduce to the Court Todd Sawicki, who is also at counsel table with us. Mr. Sawicki is a partner with Alston & Bird in Atlanta.

Judge, first of all, I want to say that we were prepared and would have – could have been here yesterday had we been given notice. I have every reason to believe that everybody was aware who represented the defendants in the case, since there are pleadings pending in the case in both – in Judge Salmon's court, but we were not.

We didn't hear about it until after five o'clock yesterday afternoon, after the Court had entered this order, and this morning, in the – in the "Rome News-Tribune," there is a big article about Mr. Pimper's business. There was a news conference held this morning when the District Attorney stated that she had filed this action yesterday and had gotten an order and, then, made the statement further that she intended to follow up with criminal action.

That has put a whole different flavor intent, [sic] of course, Your Honor, on – on us, particularly in view of the fact that we haven't – in the meantime, there's been a padlocking of the doors of D.L. Pimper Group and Wall [4] Street Creations, Mr. Pimper's business. We've not been able to get to any records, and, from a substantive standpoint, as to the allegations, we really cannot be prepared in less than twelve hours' time, of – of practical time, –

THE COURT: Well, let me interrupt you just a second. The – I felt that there was some reason in my mind to give you an opportunity to come to court. I realize that from last night when you – when I was contacted to this morning is a very short period of time, and you're, as you say, you're laboring under some disability.

I will – I want to expedite it, but I don't want to expedite it to the extent that you don't have an opportunity. So just – I'll not interrupt you again, and, when you get to the point where you were going to ask something from me, I'll see what direction we're going in.

MR. ASKEW: All right, sir. The – the – really the only avenue left for us today, because we can't defend the substance of it and because – and I would state to the Court that we – we will be prepared at a later time to do so – is the question of the injunction that the Court entered. And as I understand the statute, it's based upon evidence of flight or some basics that assets would [5] be removed from the jurisdiction of the court that would have justified such an action under title 16, and we do not believe there is any evidence. We don't know what evidence was presented to the Court yesterday, so it's very difficult for us to respond.

The situation that we're in, Your Honor, is that if Mr. Pimper and D.L. Pimper Group, which is an ongoing business dealing with stocks and bonds and – and – and customers, is kept out of business today, for the rest of today and tomorrow, we think today, particularly in view of the publicity which has been wrought upon us, that it would effectively – he'll be out of business anyway. It will have closed his business down completely without ever having an opportunity to address the substantive issues. They will, quite candidly, become moot insofar as that business is concerned.

And we're calling upon the Court to at least fashion a remedy that would allow D.L. Pimper Group to continue to operate its business. Now, if you want the receiver to sign checks or if you want them to monitor the business in however way, that's another issue.

I will tell the court, because I feel compelled to do that, this case is not an isolated case. There have been lawsuits filed on the very issues that are the subject matter of this case on two occasions. One was [6] filed in the State Court of Fulton County, Georgia, and it ended up being dismissed. A second action has been filed on behalf of the – of plaintiffs involving the exact allegations that are the subject of this case in the United States District Court in Atlanta, and we have a copy of those pleadings, and on January the 24th, there was an answer filed.

There has been an order entered by Judge Shoob in the federal court dismissing these state RICO actions because of preemption claims of the federal claims of class action claims in his court. So all of these – these are not new allegations, and they've been dealt with and have been dealt with twice by dismissals in the federal court in Atlanta.

The allegations of wrongdoing, assuming for discussion that there were any, there have been SEC investigations last year. There was a SEC deficiency letter issued last year. There has been response by Mr. Pimper and

D.L. Pimper Group in working with the officials of the Securities Exchange Commission to address those deficiencies. There has been no client who has lost any money. There is an ongoing business with people depending on their broker being to – helping them with their investments on a regular basis.

Mr. Pimper has not left the area. He has not [7] threatened to leave the area. He has been carrying on business since this started back in January a year ago, 2000. Everything has been going on, subject to their claims, without interruption and without damage to anybody, and no property has mo – been removed, nor will it be removed, and quite candidly, Your Honor, we're at a loss to understand what evidence would justify the Court's imposing the injunction that was signed yesterday, and I assume that Ms. Colston is prepared to tell us, but we don't know what it would be.

But the point, the basic point, is this. If we don't get back to work under whatever supervision the Court may deem necessary, if any, then we are gone before we ever have the opportunity to address any substantive issue in this lawsuit. We have lost our businesses and we are gone, irreparable, irreplaceable harm to Mr. Pimper and to his businesses, never to return, even if he is later allowed to defend the claims and prevail.

So that's the basis of our position today. I would like, if I may, to ask Mr. – if you, the Court, would indulge us, for Mr. Sawicki to also address the Court on points of – he thinks pertinent.

THE COURT: All right, sir.

MR. SAWICKI: Thank you, Your Honor. May it please the court, good afternoon, Your Honor. Thank you for [8] hearing us on short notice.

As Mr. Askew mentioned, I'm with Alston & Bird in Atlanta, and have been representing Mr. Pimper and the D.L. Pimper Group in the defense of a class – a pur – excuse me, a purported class action claim on behalf of all of the customers of D.L. Pimper Group from 1992 through the present.

That case was filed originally in the Fulton County State Court in May of 2000. We immediately removed that case to the federal court. That case included allegations that the Pimper Group's asset allocation program was the basis for a Georgia RICO claim because the allegations were that Mr. Pimper and the Pimper Group were – had promised to perform certain services, and they took a fee in return for that promise but did not perform the services.

Upon any sort of study of that complaint from its inception and the District Attorney's complaints in this case, the Court will recognize that the allegations are substantively identical and indeed I would venture to say that there was wholesale copying of those allegations by the District Attorney from the work of the class action counsel lawyers. That – the result of our removal of the case to federal court was a dismissal of the Georgia RICO allegations, because under the federal securities laws [9] all state law claims are preempted.

There is one claim remaining in that class action case, and, again, this is a class action punitively brought on behalf of all of the customers of D.L. Pimper Group, and there is a damages claim pending, and we have filed an answer to that case, and, if the Court doesn't already have these papers, I would like to provide you (and I have already provided copies to Ms. Colston, I believe. Did we?) –

MS. COLSTON: [Indicating with gestures and facial expression that she did not have the documents.]

MS. ASKEW: If not, we will.

[Whereupon, Mr. Goselin produced documents, giving them to Ms. Colston.]

MR. SAWICKI: – of the original complaint in state court; the original order from Judge Shoob dismissing the plaintiff's complaint for failure to state a claim; a subsequent order dismissing a – as being preemptive to the Georgia RICO claims; the plaintiff's second amended complaint, which the Court should compare with the District Attorney's complaint in this action; and, then, the defendant's answer in that federal court action, showing our position in the pleadings with respect to the allegations in that case. Now, –

THE COURT: That's fine. I'll be glad to take them [10] from you and look at them. I do not have them.

MR. SAWICKI: Thank you.

[Whereupon, the documents were given to the court.]

MR. SAWICKI: Now, I wanted to share those details with you, because I think they're important for a few different reasons. First, as Mr. Askew indicated, the District Attorney was, or certainly easily could have been aware of the fact that D.L. Pimper Group and Mr. Pimper had counsel both here in Rome, this fine law firm, and in Atlanta, which had been involved for more than six months in dealing with the substantive issues that are at the gravemen of the District Attorney's civil forfeiture complaint, and yet, neither Bri – Brinson, Askew, and Berry, nor our law firm was contacted by anybody before the ex parte order was entered, and the first we found out about it in wh – is when Mr. Pimper called in a panic at 4:30 yesterday upon his return to the office to find sheriffs and an attorney for a receiver there, and he was per – he was forbidden to enter the premises.

This morning when we arrived in – in Rome to attend the District Attorney's press conference, we learned for the first time that the District Attorney, evidently, has been carrying on a criminal investigation of these matters and she quoted – she stated in that press conference that she expects that a criminal indictment or [11] a further criminal investigation, at the least, will follow on this civil forfeiture proceeding.

That announcement has had the effect of gagging the defendants and absolutely precluding us from bringing forward any real evidence to rebut the allegations that are the basis for the TRO. For example, we do not have access to any records.

We expect those – we'd be – we'd be able to prove with those records that, number one, no customers have lost any money as a result of these actions. In fact, no one was misled as to the amount of fees they were being charged at any time during this entire process.

We would also be able to expect to show the nature of the services that were provided throughout this entire period and, most importantly, the nature of the services and the nature of the business that is currently being provided, and that is important because one of the key premises of the District Attorney's request for TRO and one of the key allegations in her complaint is that this alleged fraud is continuing.

I don't know what evidence the Court may have heard or what evidence the District Attorney has on that point, but I am confident that, if given the appropriate opportunity, the defendants could show that there was never any fraud, number one, and, number two, there [12] certainly is no alleged fraud continuing.

Not only have we been deprived of records, Your Honor, but, by virtue of the announcement of the criminal investigation, we do not have the ability to bring witnesses toward who are willing to testify and risk criminal prosecution themselves or further investigation or risk waiving their privilege against self-incrimination.

This is one of the most egregious examples of unfair practices that has resulted in our client being effectively put out of business without us even being able to say boo, without us even knowing about it, for all practical purposes. This is the first we're here to – to talk about it, and this is the first opportunity. We have absolutely no effective ability to present you with any evidence to rebut the allegations, nor have we seen any of the evidence that the District Attor – Attorney presumably has to support her allegations of risk of flight and continuing fraud.

The best we can do, Judge, I think, at this point, as Mr. Askew requested, is to simply ask you for relief from the TRO to permit D.L. Pimper Group to resume normal operations under the supervision of Mr. Pimper and whatever other sort of supervision that the Court deems appropriate to protect the alleged interest of the [13] District Attorney and the people of the state of Georgia, but – but – and we would also ask for some direction about how we can get the opportunity, number one, to find out what the District Attorney's evidence is, if she indeed has any persuasive evidence, and, number two, to give us an opportunity to come back before this Court to rebut their allegations and to per – present our own evidence to prove to you that there is no basis for the TRO and there is no basis for this backhanded way to achieve the destruction of one individual and one individual's business.

Thank you.

MR. ASKEW: Judge, if I may have one more word. Just as a point of evidence, the verification of the District Attorney to the complaint that was filed is not one based upon any personal knowledge and information. It is simply one based upon her best knowledge and information. There is no personal knowledge.

From an evidentiary standpoint, Your Honor, unless there was testimony provided to the Court, there's absolutely no credible admissible evidence presented by this petition, because it does not qualify under the hearsu – say rules as being admissible for any purpose and – and, again, we don't know what the evidence presented yesterday was or what the District Attorney [14] will present today, but I will reiterate, this is a – a trust situation where people have to depend upon the trust of Mr.

Pimper and that organization, and beyond today it'll be a moot question.

THE COURT: All right. Thank you.

Ms. Colston?

MS. COLSTON: Thank you, Your Honor.

Mr. Askew is exactly correct. This is a matter of trust. This is the trust of investors who went to Mr. Pimper believing that he would do what was in their best interest. Mr. Pimper knew that in January of 2000, which is attached to the complaint, that the Securities and Exchange Commission of the United States told him that his asset allocation program was, in essence, fraudulent for not doing what he sa – promised that he would do; that his advertisements were fraudulent because they promised customers services that were not being rendered; that, in effect, all they were doing was looking in the newspaper to see how the stocks were doing and charging these people the amount of money that was just incredible, between .75 and 1.5 percent on a quarterly basis, to review these investments.

I be – have reason to believe now that the receiver has only been in there for a short period of time, and he is here to address the Court as the Court's receiver to [15] let you know what he has found so far, but it appears that in one year alone we're talking about 1.2 million dollars in asset allocation fees that have been paid to Mr. Pimper that, according to the SEC, were not earned. This is a trust situation, Your Honor.

So far as the – the question of whether or not it will close down his business, I have done everything within my power to try to calm the investors with the press conference this morning and the newspaper article that came out this morning to tell everyone, to let them know that their money is safe with Royal Alliance right now, that nothing – they do not need to worry, they do not need to flee, they do not need to – I can't control what they're going to do with their money.

So far as letting Mr. Pimper back into D.L. Pimper Group to operate this business would be, in essence, the Court giving an order to allow the – this criminal activity, that the State is alleging is criminal, to continue and giving him a court order to do so.

As far as no client losing money, that is absolutely not true. These clients have at least lost the money that they paid to him for the services that have not been rendered. These clients have at least lost that.

The receiver's only been in there a few hours. As far as – I talked to Mr. Webb a little bit before five [16] o'clock yesterday evening, they were just then locking the doors and he spent the rest of the evening just trying to secure everything and has only looked at just a few items. To do anything that would allow Mr. Pimper access into that business at this point would be very premature in the State's opinion, because there is so much that the receiver needs to look at.

As far as what is reasonable, as far as the Court fashioning something, we do not want to totally ruin the rest, you know, the chances of this business ever becoming successful again. I don't want – that is not the State's intention. If the Court could find some way to – to fashion something that would allow that, but I don't know what it could be. At this point, I think we need the – to let the receiver do his work that the Court has appointed him to do and see what he comes up with.

I think it may be helpful that if the – if the Court heard from the receiver now and see what has been found in the few short hours be's been given to work on the – on the case right now, one thing I think that he will bring to your attention will be the fact that not only has the SEC done something in January 2000, and they say that they a – addressed those deficiencies, but Royal Alliance even just a few – a couple of months ago fined them $20,000 for doing things that they're not supposed to be [17] doing. So, yes, sir, this is ongoing and the State has every reason to believe, and, yes, we can prove that this is ongoing.

As far as no one being contacted, of course, that goes without saying. As far as why we didn't give them notice, that's the whole purpose of secur – that's to secure assets for the benefit of these people that have placed their trust in Mr. Pimper, for the benefit of these people that he has their money he has powers of attorney and releases and things such as that where he can deal in their assets on their behalf as the SEC said that he had.

Your Honor, I would just ask that the Court allow this to continue, allow it to continue for a reasonable amount of time until the receiver can have his work, and I ask the Court to hear from the receiver for a briefly – just to see what has been – what has been found so far to allow the Court making the best – its best decision.

THE COURT: All right. Call him around.

MS. COLSTON: Mr. Ekonomou.

THE COURT: You want to swear him [to the clerk]?

You want to come on around and – you want to call him as a witness?

MS. COLSTON: I don't – I don't – normally that's, as I understand it, he's the Court's receiver and he's – he's [18] an attorney. I don't – we can, if that's what the Court wants.

THE COURT: Well, I didn't know whether they wanted to cross-examine him or not.

MR. ASKEW: Your Honor, we'd like the privilege of cross examining him. We've not had the privilege of anybody else at this point, and we'd like to cross-examine him if he's going to testify.

THE COURT: Okay.

MR. ASKEW: We'd like for him to take –

MS. COLSTON: He's just –

THE COURT: Let me do this.

MS. COLSTON: – reporting to the Court.

THE COURT: Let me do this. Before we call him as a witness, let me meet with counsel in the jury room.

MR. SAWICKI: Thank you, Your Honor.

THE COURT: Let me see what I can come up with. We're going to be off the record in there. Just have a seat, if you will. We'll go in the jury room. Court'll be at ease until I get back.

[Whereupon, court was at ease from 12:27 p.m. until 12:56 p.m., when these proceedings were reconvened as follows:]

DEPUTY SHERIFF: All rise, please.

THE COURT: Thank you very much. Be seated.

[19] I – to announce for the State and for the defendants, I have met with both sides. I'm trying to – and we're going to fashion an order that will protect the interest, as far as possible, of the investors, and to keep – and look after, to the extent that we can, the Pimper Group, and an order will be fashioned and be submitted to me and we'll proceed from there.

Court's adjourned.

MS. COLSTON: Thank you, Your Honor.

MR. SAWACKI [sic]: Thank you, Your Honor.

[Whereupon, these proceedings were adjorned at 12:58 p.m.]

COPY

COURT REPORTER'S CERTIFICATE

COUNTY OF FLOYD,
STATE OF GEORGIA:

I, Fay Frankland, do hereby certify that the foregoing record, pages 2 through 19, is a true, complete, and correct transcription of the proceedings reported by me in the case of the State of Georgia ex rel. Tami P. Colston, District Attorney for the Rome Judicial Circuit, versus David L. Pimper, Amy F. Pimper, D.L. Pimper Group, Inc., and Wall Street Creations, Ltd., Civil Action File No. 01CV-21058-3, in the Superior Court for the County of Floyd, State of Georgia, on Tuesday, January 30, 2001.

This 1st day of February, 2001.

s/__________________________
FAY FRANKLAND, C.C.R. B-332
OFFICIAL COURT REPORTER
ROME JUDICIAL CIRCUIT

IN THE SUPERIOR COURT FOR THE COUNTY OF FLOYD STATE OF GEORGIA

STATE OF GEORGIA *ex rel.* TAMI P. COLSTON,
District Attorney for the Rome Judicial Circuit,

Plaintiff,

VS.

DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC., and WALL STREET CREATIONS, LTD.,

Defendants.

CIVIL ACTION
FILE NO.: 01CV21058-3

DEFENDANTS' MOTION TO DISSOLVE ORDER APPOINTING RECEIVER AND GRANTING TEMPORARY RESTRAINING ORDER

(Pages 1 through 49)

TRANSCRIPT OF PROCEEDINGS

Before The Honorable ROBERT G. WALTHER, Judge,
on Tuesday, February 6, 2001

APPEARANCES OF COUNSEL:

For the Plaintiff:

Ms. Tami Colston
District Attorney
Floyd County Courthouse
Rome, Georgia 30161

Mr. David Scott McLaughlin
Special Assistant District Attorney
Office of Attorney General
Department of Law
40 Capitol Square, S.W.
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FAY FRANKLAND, C.C.R.
OFFICIAL COURT REPORTER
FLOYD COUNTY COURTHOUSE, SUITE 214
ROME, GEORGIA 30161

APPEARANCES (Continued):

For the Defendants:	Mr. Robert Brinson Mr. C. King Askew Brinson, Askew, Berry, Seigler, Richardson & Davis Rome, Georgia 30161
	Mr. Theodore J. Sawicki Mr. John H. Goselin II Alston & Bird, LLP Atlanta, GA 30309
For the Receiver:	Mr. Michael G. Lambros Ekonomou, Atkinson & Lambros 450 The Hurt Building 50 Hurt Plaza, SE Atlanta, GA 30303

For First Floyd Bank: Ms. Beth Rogers
Morris, Manning & Martin
Attorneys at Law
1600 Atlanta Financial Center
3343 Peachtree Rd. N.E.
Atlanta, GA 30326-1044

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[3] [Rome, Floyd County, Georgia; Tuesday, February 6, 2001; 3:35 p.m.; in open court:]

DEPUTY SHERIFF: All rise. Court is now in session.

THE COURT: Thank you very much. Be seated.

Y'all are going to have to find some way to scrooch together so I don't have anybody standing up. Any of the lawyers that are in the audience that want to have a seat in the jury box, I'll let them do that.

All right. For the purpose of the record, who is here representing the state?

MS. COLSTON: Tami Colston, District Attorney, Your Honor, and David McLaughlin from the Attorney General's office, who is here as a Special Assistant District Attorney.

THE COURT: All right. And who is here representing the defendants?

MR. BRINSON: Brinson, Askew and Berry law firm, Your Honor, and Alston & Bird.

THE COURT: All right, sir.

MR. SAWICKI: Afternoon, Your Honor.

THE COURT: Who's going to be handling it for the State?

MR. SAWICKI: Excuse me. Excuse me, Your Honor. There are some other lawyers representing other parties and interests in this matter that probably ought to be [4] given an opportunity to make an appearance.

THE COURT: Okay.

MS. ROGERS: Beth Rogers for First – First Floyd Bank.

THE COURT: Anybody else?

MR. LAMBROS: Your Honor, I'm Michael Lambros. I'm here on behalf of the receiver, Andrew Ekonomou.

THE COURT: All right. Now, then, let me see if I can get some idea of the direction that we're going in. Is the State ready?

MS. COLSTON: To the extent, Your Honor, that we can re – reply, given the – we were served with this actual motion as to what the grounds were late yesterday afternoon. We will reply to the extent that we can. We'll see how far we can get. If we get to a point that we can't, we'll let the Court know.

THE COURT: All right. Are the defendants ready?

MR. BRINSON: We're ready, Your Honor.

THE COURT: All right. I guess those that are observing, you're ready to observe? Is that correct?

MS. ROGERS: Your Honor, Beth Rogers, again on behalf of First Floyd, I – I'd like to – to have an opportunity to address the Court.

THE COURT: About what?

MS. ROGERS: About my client's interest in the [5] collateral.

THE COURT: Well, let me here [sic] from you so maybe I can get that out of the way. Come on around to the podium.

[Whereupon, Ms. Rogers approached the podium.]

MS. ROGERS: Your Honor, Angela Burnett from First Floyd Bank is here with me. She's the special assets manager for the bank. The bank is owed one point – or $1,081,149, consisting of the eight loans. That's through – principal and interest through February 6th. The loans are secured by a first on D.L. Pimper's inventory, equipment, and accounts receivable; a second on the inventory and the receivables of Wall Street Creations; and a first on the business location, which is 501 East First Street, and a second on the residence of the – Mr. and Mrs. Pimper, 488 Sproull Road. There are also two cars which secure two smaller loans, a 1997 BMW and a 1996 Suburban.

Your Honor, all these loans are in default, they're cross-collateralized, and the bank, under the UCC in its loan documents, has a right to collect the collateral. There is also an assignment of rents, so the bank has a right to collect the rents, to collect the accounts receivable, and to seize any of the other assets according to its loan documents.

[6] So we would request that the Court modify the – the injunction or the rece – the appointment of the receivership and allow the assets to be turned over to the bank.

THE COURT: So are you stating that if the receiver was not there, or if I modified it as you just requested, the bank would proceed to foreclose?

MS. ROGERS: Yes, yes. It would exercise its rights under the loan documents and, you know, a part of that would include collecting accounts receivable, collecting the rents. I understand that the build – that portions of the building are rented by other tenants and that the debt – the – the borrower is collecting approximately $2,000 a month –

THE COURT: How far are you in default?

MS. ROGERS: Um, –

THE COURT: Not you, but the borrower?

MS. ROGERS: The borrower – two of the loans are – well, there's a $200,000 loan which has actually matured, and how many months behind?

MS. BURNETT: Various dates, several in the thirty-day range.

MS. ROGERS: I – I think they're – they're mostly thirty days or more behind.

THE COURT: All right. That's your position?

[7] MS. ROGERS: That's our position, yes, Your Honor.

THE COURT: Thank you, ma'am.

MS. ROGERS: Thank you.

THE COURT: Does anybody else want to state a position until I get to the State and the defendants?

[No responses were indicated.]

THE COURT: As I tried to look through all of these pending motions and the appearance of counsel for other creditors, the major one that is being addressed, other than I think the motion to amend the receivership order, deals with the authority or more or less deals with the question as presented by a necessity of the Court to hear a – have a hearing on the interlocutory injunction.

I thought we were – are we having that now, in y'all's opinion, the – whether or not the State is entitled to an injunction and a – and a restraining order and the appointment of a receiver?

MR. BRINSON: Your Honor, we have moved to dissolve the order that's –

THE COURT: Okay.

MR. BRINSON: – already entered.

THE COURT: So you're, in effect, asking for the hearing that the law gives you to have the shate – State show why the injunction should continue. Is that correct?

[8] MR. BRINSON: I don – I don't perceive it that way. I – I don't perceive this as the hearing on interlocutory injunction. I see this as a motion to dissolve based upon the jurisdiction and on other grounds.

THE COURT: How about asking Anne to bring me Title 9, Section 11 [to the clerk]?

See, the motion – actually the Civil Practice Act provides that a motion for an interlocutory injunction shall be set down for a hearing at the earliest possible time and shall be on the issue of whether or not the injunction can continue because you didn't get a chance to be there, and I – I'm wondering whether or not I'm trying to go around about what the law says that I should have immediately.

MR. SAWICKI: Your Honor, if you'll read on down in Section 65(b) of the Civil Practice Act, it says [reading]: On two days' notice to the party who obtained the TRO without notice, or on such short a notice to that party as the Court may prescribe, the adverse party (that would be the defendants in this case) may appear and move its dissolution or modification.

THE COURT: Okay. I agree that's there, but it – it's all the same thing.

MR. SAWICKI: No, Your Honor.

THE COURT: We're trying to question whether or not [9] the State is entitled to an injunction. Isn't that correct?

MR. BRINSON: No, sir.

MR. SAWICKI: No, sir. That's is [sic] not correct.

THE COURT: Well, you're saying that they are entitled to an injunction?

MR. BRINSON: No, sir. What we're here to say today is the order that is existing is void because Your Honor did not have jurisdiction to enter it.

THE COURT: Okay.

MR. BRINSON: And we have authority.

THE COURT: All right. I think we probably need to go into that, then.

MR. SAWICKI: Yes, Your Honor.

THE COURT: And I will be glad to hear you.

MR. BRINSON: All right, sir.

Your Honor, we have, if the Court please, we have made a motion, not to modify the existing order –

THE COURT: Well, I think we had a couple of motions and – but, anyway, you're arguing the motion to declare or to have the Court rule that I don't have jurisdiction?

MR. BRINSON: No, sir. That you did not at the time –

THE COURT: That I did not have jurisdiction?

MR. BRINSON: Yes, sir.

[10] THE COURT: Okay.

MR. BRINSON: And in that connection, Your Honor, we have filed a notice to produce to the State, and, if I might, could I go through that to see what has been produced?

THE COURT: Have you gotten anything?

MR. BRINSON: No.

THE COURT: Okay. Confer with counsel to see what they've got.

MS. COLSTON: Your Honor, I'd rather state to the – to the Court, if I may, so that everything's on the record.

THE COURT: Okay. Just go through and tell me what you've –

MS. COLSTON: I brought in –

THE COURT: – what you've requested and, then, you can tell me what we've got.

MR. BRINSON: All right, sir. May we do that serially?

THE COURT: Sure.

MR. BRINSON: No. 1 is any and all notes or other documents which memorialize or refer to any reasonably diligent inquiry made by the District Attorney prior to verifying the complaint.

THE COURT: Okay. Let's stop there, see what we [11] have. How do you respond to that?

MS. COLSTON: Your Honor, as far as notes and documents go, documents, I have those in my possession today; notes and things that I made, I would – they are attorney work – work product, and I would not be inclined to turn those over to the defense, especially in light of no showing of why and why I should have to produce any of these items. I see no cause on the motion to give them the right to do this.

MR. BRINSON: May I respond, Your Honor?

THE COURT: [Affirmative indication.]

MR. BRINSON: Your Honor, its – it appears that the District Attorney is both the petitioner and – and her own lawyer in this case, and we were not given any notice, as Your Honor knows, of this hearing. We don't know what evidence was presented to Your Honor. All we have is a – is a verified complaint. That's all we've seen of the motion and the attached documents. We don't know what took place at the hearing.

Now, so we have produced – we have asked that these documents be produced to find out, number one, on – on the No. 1, to find out just what the District Attorney knew and what the District Attorney had by way of making a diligent inquiry before the verification was entered, because if the verified complaint is all Your Honor [12] reviewed before you entered the order, then we think we can inquire into that verification and what was the basis of it.

THE COURT: All right. She's not making that available to you.

Now, what else do you have?

MR. BRINSON: No. 2, the information, that's a term of art, as the term is used in the verification to the complaint. The verification was made not positively that it was true, that the allegations in the complaint were true, but that they were true to the best of her information, knowledge, and belief. We want to know what that information is.

And if – and, Your Honor, by the way, if she's not going to produce it, I mean, it's an issue in the case in the very pleadings, certainly that is.

THE COURT: Let me get your motion.

All right. How do you respond to that?

MS. COLSTON: Your Honor, there's a very simple way to do this without a notice to produce to me personally. I am not bringing this lawsuit personally. I am the District Attorney. I'm bringing it as in any civil action that I would bring or have brought for the people of the State of Georgia. The people of the State of Georgia is the plaintiff in this action, Your Honor.

[13] So far as getting to the issue, I want to help them. I know that they weren't present. I'd be glad to answer any questions they have as to what was brought and what information was put before the Court in order to attain the order that is before them now, but to do a notice to produce of my work product and to ask for all these documents that – and – and such, that is essentially them getting discovery of my file without going into any discovery, I would object to. If the Court wants me to go into a statement as to what was presented at the – at the hearing, I'd be glad to, however the Court wants me to do it, but I do object to having to produce work products and such.

THE COURT: All right. Let's go to the next one.

MR. BRINSON: Well, Your Honor, as I say, the – we are not here to attack the District Attorney in any way. We realize that she is the spokesman for the State. However, the verification (I am responding to that, if I may, before I go to the next item), the verification is a pleading in the case. I mean it is part of the pleading in the case, and it says *on information and belief,* and we wish to know what that information is. We're flying blind here, Your Honor, and we have been, and this is one of fourteen items we have subpoenaed.

THE COURT: All right, sir.

[14] MR. BRINSON: No. 3, all, quote, evidence, presented at the ex parte hearing referred to in the order. That is in the first paragraph of the order, so we want to know and to have it produced what was that evidence produced to the Court.

THE COURT: And I think she probably addressed this on the last one, –

MS. COLSTON: Yes, sir.

THE COURT: – so let's go to the next one.

MR. BRINSON: Your Honor, we have, in our motion, called to the Court's attention that the verification was made on her knowledge, information, and belief. That is not a sufficient verification under the *Code* section that governs verifications on extraordinar – extraordinary remedies, which certainly the receivership and the injunction are, and 9-10-110 is what governs that, and – and the cases thereunder say that that is an insufficient verification, so that if – if that was all that was presented to the Court, and we don't know yet, then there are no other satisfactory proofs. The law says that the verification may be supplemented by, quote, other satisfactory proofs. We've asked that she produce the other satisfactory pre – proofs that might have been presented to the Court.

MS. COLSTON: The same answer, Your Honor. The [15] other satisfactory proofs, as the Court knows, was presented in the form of testimony to the Court under oath.

THE COURT: All right, sir. What's the next one?

MR. BRINSON: And – and do I understand that that was all? There was – there were not any other documentary docu – documentary evidence?

MS. COLSTON: That hasn't been asked yet. Are you asking me – if you're asking now, I'll be glad to respond (I said that a minute ago), but I'm waiting on the Court to tell me what to do.

THE COURT: Well, you know, he's asked for certain things, –

MS. COLSTON: Okay.

THE COURT: – and I'm – when he asks for it in his motion for produce, then I either want you to give it to him, –

MS. COLSTON: Okay.

THE COURT: – or tell me what your response is.

MS. COLSTON: Well, I've told you, my response is, Your Honor, the – what was presented at the – at the hearing. As far as that, Mr. Brinson, was the SEC letter was attached to the complaint. There was testimony from the –

THE COURT: Well, I don't think he's asking for the [16] testimony –

MS. COLSTON: Okay.

THE COURT: – right now.

MR. BRINSON: No, it's all –

MS. COLSTON: Okay.

MR. BRINSON: – the physical documents.

MS. COLSTON: The S – those were – the SEC letter and testimony.

MR. BRINSON: Your Honor, we also asked for – O.C.G.A. 16-14-6(b), which is a part of the RICO Act, requires the execution of a proper bond before – against an injunction being improvidently granted, and we have not seen that bond. It's not within the papers that are filed with the Court. It's not on the docket. We have a certified copy of the docket here. We're asking the District Attorney to produce the bond that was executed.

THE COURT: It was ex – it was issued without a bond.

MR. BRINSON: Sir?

THE COURT: It was issued without a bond.

MR. BRINSON: Well, Your Honor, we'll get into that, but, in our –

THE COURT: Yeah.

MR. BRINSON: – motion, we take the position that that was a condition –

THE COURT: I understand that, but I –

[17] MR. BRINSON: – of the re – that it receive –

THE COURT: – I'm just answering that question. There was no bond posted.

MR. BRINSON: I understand.

Any cor – No. 6, any correspondence or other communications between you and any other lawyer or third party relating in any way to the complaint, Exhibit A, the motion, or any other aspect of this proceeding.

MS. COLSTON: I have my file here, Your Honor, but I would object to producing any correspondence between myself and anyone else regarding this. It's – it's work product. It's privileged. It's things that – in preparation of litigation, and I would object to any of that, and I don't know – I can't see any good reason for producing it.

MR. BRINSON: Your Honor, we believe that the Georgia *Code* 9-11-26 provides for the discovery, complete discovery, of those kinds of things, but, number two, again, we make the point that Ms. Colston is both – even is she is *ex rel.*, she is the petitioner and – and her lawyer. There was a way to do this probably, and that would have been for the Attorney General to sign on as the lawyer, but that didn't happen. So we have no way of knowing. We – we would like to have that to get behind – to see what is behind the bringing of this lawsuit, and [18] we think we're entitled to that.

MS. COLSTON: All I can respond, Your Honor, is that it came to the State's attention that there was fraud, misrepresentation, and illegalities going on that put investors and people of this county at risk and their money at risk, and it was my – it's my duty to act on that.

MR. BRINSON: In this civil action, Your Honor, that the District Attorney is bringing, then therefore we would like to know how it came to the State's attention, and we believe that it might have been from third parties or – or lawyers, private actors, and we believe we're entitled to that.

THE COURT: All right, sir. The next one, let's see if there is anything that she has.

MR. BRINSON: No. 7, any document evidencing notice given or attempted to be given to the defendants or any of them or their attorneys prior to the *ex parte* hearing.

MS. COLSTON: There – there is none.

MR. BRINSON: There is none?

Any document or physical evidence presented to the Court prior to 2:35 p.m. January 29th, 2001, which was the time and date of the order, which supports a finding that defendants or any of them were selling, concealing, removing, or making any effort to dispose of or encumber [19] any of their property.

MS. COLSTON: There's no documents, Your Honor, or physical evidence.

MR. BRINSON: No. 9, any document or physical evidence presented to the Court which supports a finding of the existence of an emergency or of a manifest danger of loss, obstruction, or material injuries to any property of the defendants.

MS. COLSTON: The same answer, Your Honor. There's no documents or physical evidence that was presented prior – prior to that.

MR. BRINSON: No. 10, any document or physical evidence showing any immediate danger of significant loss or damage.

MS. COLSTON: The same answer, Your Honor.

MR. BRINSON: No. 11, any document or physical evidence relating to this case which was in your possession, custody, or control on or before 2:35 p.m. January 29th, 2001, and was withheld from the Court.

MS. COLSTON: There is none, and let me state, the documents, I have the documents in the prior lawsuit.

MR. BRINSON: You do have the documents –

MS. COLSTON: I did have some of those. I did have most of those documents, yes.

MR. BRINSON: In the federal lawsuit –

[20] MS. COLSTON: In both the lawsuits –

MR. BRINSON: – that's been pending since May of 2000?

MS. COLSTON: I believe that, yeah, the Carrie Ball/John Welborn suit. Is that the one you're referring to?

MR. BRINSON: Yes. You do have those to produce?

THE COURT: John, since I made –

MS. COLSTON: Y'all made me copies.

THE COURT: – some of the folks sit down, if they want to stay with me, let them sit up here.

DEPUTY SHERIFF: Yes, sir.

THE COURT: If they are not lawyers, then they'll have to step out if they can't get a seat.

MS. COLSTON: I had copies, but you've also given me copies yourself, –

MR. BRINSON: Okay.

MS. COLSTON: – so if you want your copies back, –

MR. BRINSON: No, I understand.

MS. COLSTON: – I'd be glad to.

MR. BRINSON: But you did have those copies before this hearing?

MR. [sic] COLSTON: Yes.

MR. BRINSON: No. 12, any press releases related to the complaint or to defendants in any way and any drafts thereof and any document relating thereto.

[21] MS. COLSTON: I have those, Your Honor, and I have them in here. I'd be glad to give them copies of the first. The second one was passed on. It was just the order that we all came up with together, and Mr. Sawicki saw the press release and agreed to it, which said attached is an order that the Court filed today; but I have that, if they want it, and –

MR. BRINSON: Did you –

MS. COLSTON: – the – the first one, telling the investors that their assets were safe, I have that here. If they want a copy of that, they can make one.

MR. BRINSON: Well, was – was there a – do I understand you also have a press release, the first press release?

MS. COLSTON: The first one's here, yeah.

MR. BRINSON: Are there any drafts of it?

MS. COLSTON: No.

MR. BRINSON: Are there any in existence?

MS. COLSTON: No. Any drafts in existence?

MR. BRINSON: Of that press release?

MS. COLSTON: Generally, I just typ – I type everything myself and, generally, it's put on my computer and I change it as I go and, then, print it out when I'm done. So I don't keep drafts of –

MR. BRINSON: Okay. You –

[22] MS. COLSTON: – things that I do.

MR. BRINSON: So you do have that to produce?

MS. COLSTON: Yeah, I do have it.

MR. BRINSON: No. 13, any videotapes, photographs, inventories, or other records of the property of the defendants or any of them.

MS. COLSTON: Now, I don't have that. The receiver may, but this wasn't addressed to the receiver.

MR. BRINSON: All right. No. 14, any orders or authorizations directing surveillance of any type on the defendants or any of them.

MS. COLSTON: There are none.

MR. BRINSON: All right, Your Honor. If she would produce what she's agreed to produce, and –

THE COURT: Okay.

MR. BRINSON: – if Your Honor could give us a ruling on the other, we're prepared to proceed.

An – and, Your Honor, we would – I believe she has offered and we would like to have the actual copies of the federal lawsuit she had, that she had before we gave her copies.

MS. COLSTON: I don't know which are which at this point, Mr. Brinson. I put them all in a little file that says Pleadings in Ball/Welborn Suit.

MR. SAWICKI: We'll take that one. We'll take them [23] all, because I don't remember what I gave you.

MS. COLSTON: I don't remember. We'll take them all [laughing]. That's cute. I think I had the order of the Court.

You gave me these items, didn't you?

MR. SAWICKI: I gave you –

MS. COLSTON: I know you gave me that item.

MR. SAWICKI: That's right.

MS. COLSTON: And you gave me that.

MR. SAWICKI: That's right.

MS. COLSTON: Those two have your stamp on them.

MR. SAWICKI: Yeah.

MS. COLSTON: You gave me that.

[Whereupon, Ms. Colston and Mr. Sawicki confer and documents are given to Mr. Sawicki.]

THE COURT: Mr. Brinson and Ms. Colston, will you come on up, and the court reporter?

MS. COLSTON: Yes, sir.

[Whereupon, counsel approached the bench, and the following bench conference was held between the Court and counsel:]

THE COURT: The thing that I'm having some difficulty on is the distinction of your motion to dismiss and my requiring her to show at a hearing the basis for continuing the restraining order and the [24] appointment of a receiver. At a hearing that I would want to have, if there is something that's not available where you can – you say ought to be available or is not in existence, or you can argue the evidence is not sufficient to grant the receiver, then I – I'm comfortable there, but, when I go back and have to take the position that I've got to take the stand and testify as to what was given to me, which I obviously thought at the time was satisfactory, then I'd be ruling on what I said.

Now, I don't know what Ms. Colston's full position is, not being ready, but I will not accept that and set this down for a hearing on the – on whether or not to dissolve the restraining order and the appointment of the receiver. I mean she's either going to have it and you're going to know what it is, and I feel very uncomfortable trying to be judge and say, well, I granted it on proper grounds, and, if there is a nicety that – that you want to have by going your way and there's a reason for it, I – I would feel more comfortable in having both hearings simultaneously, and, then, I can rule on yours, either first or rule on whether or not she's shown cause. So that – help me on what, the reason why you're proceeding this way, rather than requiring the state to show why they are entitled to a temporary restraining order.

MR. BRINSON: Yes, sir. We think – we believe that that is pursuant to the statute. It says upon two days' notice the defendants may move to dissolve, –

THE COURT: Well, –

MR. BRINSON: – and that's what we are doing.

THE COURT: – yeah –

MR. BRINSON: We don't – we don't –

THE COURT: – to move to dissolve requires the State to be able to put up their evidence to why it shouldn't be resolved – dissolved, and, if – if they cannot put it up, then I'm going to dissolve it, and, whether I'm granting your motion one way or the other, I – I want the State to be in a position of going forward with it –

MS. COLSTON: [Affirmative indication.]

THE COURT: – by putting up their evidence, and, if they don't have it, they don't have it.

MR. BRINSON: But, Your Honor, we think it's more fundamental than that, and I understand what Your Honor says. I don't think – I don't think the statute contemplates it that way. We have to have –

THE COURT: Well, I think it contemplates it both ways.

MR. BRINSON: It – it does contemplate eventually having –

THE COURT: Well, not eventually. It contemplates, [26] even without the two days' notice, –

MR. BRINSON: Yes, it does.

THE COURT: – having a hearing.

MR. BRINSON: Yes, it does, within thirty days, I think.

THE COURT: Well, no. I'm talking about before the thirty days. I'm not talking about a thirty-day hearing.

MR. BRINSON: Well, maybe – okay. But, Your Honor, our objection is that it's jurisdictional and mandatory.

THE COURT: Well, how is it jur – how is it jurisdictional?

MR. BRINSON: That's what the cases say. We can – excuse me.

[Whereupon, Mr. Brinson returns to counsel table to confer with other counsel.]

THE COURT: See, what I'm talking about is here where, you know, you can do it *ex parte*, but, then, it says [reading]: In the case where a temporary restraining order is granted without notice, the motion for an interlocutory injunction shall be set down for a hearing at the earliest possible time and shall take precedence over all other matters, except that of the same – of the same character, and, when the motion comes on for a hearing, the party who obtained the temporary restraining order shall proceed with the application for [27] an interlocutory injunction. If he does not do so, then the Court shall dissolve the temporary restraining order. So I will tell you, and, for the purpose of the record, that there were three – there were three people there, I think two officers, the chief and one other officer, and they were all sworn, and they gave testimony to me, but I can't really get in a position of having to recite to myself, if I remembered it, what the testimony was, but I'll tell you at this time, I – as I told the others, there was two factors that I was concerned about based on the evidence that I received. I was concerned about a loss of assets to the deposit – or to the clients of Pimper. I was also concerned about closing a business. Now, some of my concern by the bank has been – they're apparently going to, unless y'all can make arrangements with them, they're going to close the business.

MR. BRINSON: Well, it's in a body bag now, Judge.

THE COURT: Well, –

MR. BRINSON: I hate to say that, but it is.

THE COURT: – I – I can tell you what the receiver has suggested, and he suggested that he put the thing in bankruptcy and let the whole thing be in bankruptcy rather than a RICO statute, or just let it be a straight bankruptcy, and, then, let all the – then we'll have at it that way; but it won't be me, it'll be a referee in [28] bankruptcy.

MR. BRINSON: Well, but, Your Honor, our – our point is this. Our point is all this action, we believe, at least the TRO part, is your – because the procedure was not followed, and it's –

THE COURT: Well, I wa – why wasn't it followed?

MR. BRINSON: – it's admitted. It is – it is void, and is – and that procedure –

THE COURT: Why wasn't it followed and why is it void?

MR. BRINSON: That's what I can tell you, Your Honor.

THE COURT: Okay.

MR. BRINSON: The law says that a temporary restraining order issues only if these procedures are followed.

THE COURT: But it says a temporary order may be granted without written or oral notice to the outside party if it clearly appears from the facts shown by affidavit (and the affidavit's not sufficient; I'll agree with you on that), but the law also says if there's evidence presented, that overcomes insufficiency of the affidavit, or by a verified complaint and irreparal – irreparable, injury, loss, or damage will result before the adverse party or attorney can be heard, and I heard [29] evidence. I'll tell you that, –

MR. BRINSON: I understand.

THE COURT: – that there was sworn testimony that there was a belief that there was going to be absconding by the Pimpers. So that has been done.

MR. BRINSON: Yes, sir, but the – the second element of that, only if – and the second element says and that certificate was not filed, and we have case after case after case, Your Honor, that that is mandatory and jurisdictional.

MS. COLSTON: If I may, Your Honor?

THE COURT: No, it doesn't have to give notice. It – I don't –

MS. COLSTON: We're proceeding –

THE COURT: – I may be wrong there, but it's my understanding of the law, and I operate under the law on the basis that since these factors – these factors existed, then notice didn't have to be given.

MS. COLSTON: Your Honor, and we're proceeding because we're proceeding under RICO and not specifically that *Code* section, the RICO *Code* section and forfeiture positions – the forfeiture positions in RICO specifically say you follow that one until you go back to 9-11-65 –

THE COURT: Well let me – just a minute. See, the second part that you're referring me to, –

[30] MR. BRINSON: Yes, sir.

THE COURT: – it says [reading], and the reason – reasons supporting the parties' claim that notice shall not be required.

MR. BRINSON: Well, Your Honor, –

MS. COLSTON: It isn't the RICO law.

MR. BRINSON: Let me just see our brief. Let me have that. Let me – let me –

THE COURT: I really want to give y'all a hearing and make them put up something.

MR. BRINSON: I understand, Your Honor, but we believe that everything that's been done is under a void order.

THE COURT: Okay. I don't mind ruling on that, and I'll hear your arguments and, then, you can brief me on it, but I – if I don't rule with you, I'll require the State to show cause and I can give – start early Friday morning, but I – if – if your position, and so we can let – all the fans know about what's happening, let me go ahead and just hear your arguments that the law was not complied with on the granting of it, then – then if I – if I agree with you, I'll vacate the retraining [sic] order. If I don't agree with you, then whatever you don't get today that's available, I'll have down for a hearing, and you're shaking your head about Friday. You don't know [31] what efforts I've made to get –

MR. SAWICKI: Well, Your Honor, I'm not –

THE COURT: – there's a case that's been going on, since 19 –

MR. SAWICKI: I wasn't thinking – I wasn't thinking of you, I was just thinking of my clients. I didn't – and I was being presumptuous.

THE COURT: So far –

MR. SAWICKI: I apologize.

THE COURT: – so far as your folks are concerned, if the bank is ready to swoop down on you, then I may prolong the inevitable until –

MR. SAWICKI: Well, they weren't – they weren't ready to swoop down until things happened last Monday.

THE COURT: Well, –

MS. COLSTON: That – that's wrong. That's –

THE COURT, – anyway, go ahead and argue with me on the law that –

MR. BRINSON: At the –

THE COURT: – on what you've got to hear.

MR. BRINSON: – at the podium or here?

THE COURT: Out there.

MR. BRINSON: Here?

THE COURT: No, back there.

MR. BRINSON: Yes.

[32] [Whereupon, the bench conference was concluded.]

THE COURT: During the discussion we had up here, tried to really narrow the issue down as to what was being presented to me, and, as I understand it, that the defendants' position is that the law was not complied with on the granting the *ex parte* restraining order and appointing the receiver, and I did state to counsel when they were up here there was the petition. It was verified to the extent that it is, but there were witnesses there present and gave testimony and I gave consideration to it, but you have another reason why you think it's not valid or is void, rather.

MR. BRINSON: Your Honor, the verification issue is a very secondary one, and it was only bec – we raised that because that's all we could see. There was no transcript of the *ex parte* hearing. There is nothing else filed to give us any indication of what evidence Your Honor heard, and, in connection with that, we have a certified copy of the docket, which shows the filings that were made, and we believe that shows the filings that were not made, and I'd like to introduce that, if I may.

THE COURT: That'll be fine. It's admitted.

MR. BRINSON: May I approach the bench?

THE COURT: Sure, and it's admitted, Ms. Frankland.

MR. BRINSON: And – and if I may observe, the [33] certified copy of the docket which was pre – prepared yesterday at 8:30 in the morning, we believe it shows that there is no other written proofs as to the truth of the allegations in the complaint, and Your Honor has explained that you did hear live testimony; that no bond filed by the State, pursuant to O.C.G.A. 16-14-6(b) was executed, and we believe that to be a condition precedent, because the statute says *upon the filing of a bond,* a temporary injunction may issue.

No. 3, that there was no brief of mem – memorandum of law filed with a motion for appointment of a receiver and temporary restraining order, so that we didn't know what authorities might have been cited to Your Honor.

That no motion for an emergency hearing was filed, pursuant to Uniform Court Rule 6.7; that no certification – that there were no affidavits or depositions filed, there was no transcript of the *ex parte* hearing, but most important and the number one argument we make in our motion and brief that we're here on today is that there is no certification in writing of the efforts to give notice as required by O.C.G.A. 9-11-65.

And if Your Honor please, there are two cases, *United Food and Commercial Workers Union v. Amberjack* – there are a number of cases, but these are the two we [34] have cited. It's a 1984 case, 253 Ga. 438 shows that the statute that we're talking about, and that is 9-11-65(b) is strictly construed because of the harshness of the remedy involved.

In the Mar – *Mar-Pak* case, which we have also cited, the Supreme Court of Georgia said [reading]: It is difficult to see how a plainer restriction upon the power and authority of the judge to act in such matters could have been expressed.

And in *Amberjack,* further in *Amberjack,* it says [reading]: This requirement is not a mere formality. These notice requirements are, quote, mandatory and jurisdictional. A TRO issued without compliance is utterly void.

Utterly void is in quotes. That's a direct quote from the *Mar-Pak* case.

Now, we have heard from the District Attorney this – today. We have shown the docket to Your Honor, that, in this case, the applicant's attorney did not certify to the Court in writing the efforts, if any, which were made to give notice and the reasons supporting the State's claim that notice should not be required.

This is a fatal defect, and the Court did not have jurisdiction to enter the order. The order is utterly void.

That is our position.

[35] MR. SAWICKI: Your Honor, may I amplify that position –

THE COURT: Well, –

MR. SAWICKI: – a little further?

THE COURT: – let's wait till Mr. Brinson gets through, and, then, if you want to add a postscript to it, then that'll be fine.

MR. BRINSON: Your Honor, our other position is – is that they did not also show the immediate irreparable injury that was required to be shown under – under 1, under Section 1, which says that it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

Now, Your Honor, I walked up here today in four and a half minutes, four minutes and thirty seconds, and that was at a – just a slow pace, and we wa – we want to inquire what could have happened – what was so urgent that we were not requir – entitled to notice in four and a half minutes, given the harshness and the extremeness – the extreme nature of these remedies?

Now, Your Honor, I know we're – we're proceeding under RICO, but the RICO statute still by itself says, and I should cite to you, Your Honor, they're seeking [36] relief under 16-4-6 [sic], and subsection (b) of that *Code* section provides: Any aggrieved person or the State my [sic] institute a proceeding under subsection (a) of this *Code* section. In such relief – in such proceeding, relief can be granted in conformity with the principles that govern the granting of injunctive relief from threatened – threatened loss or damage in other civil cases, provided that no special – no showing of special irreparable damage to the person shall have to be made. Upon the execution of proper bond against damage for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

16-14-7 – now, Your Honor, we submit that the other remedies, that the petition also says that they are – they are bringing this case under o – and that the remedies are cumulative, and it doesn't prevent the other remedies of – that the law allows, so that this fundamental right, the only way that 9-11-65, the granting of a temporary restraining order could even be constitutional is by pro – providing the strict adherence to those rules that are set out to protect innocent parties, and the ca – the cases are clear.

There's a case even more recent than that that says [37] these are mandatory and jurisdictional and that an order, a temporary restraining order granted when that is not strictly complied with is utterly void.

We've got those – do we have those cases yet?

MR. SAWICKI: They're coming.

THE COURT: Thank you.

MR. BRINSON: Your Honor, we're also – we also desire to, and Ms. – I believe Ms. Colston has volunteered to testify to what was presented to the Court as well, and we would like to inquire into that and make a record.

THE COURT: No, when I talked with you-all up here, the court reporter was here and she made a record of that, and –

MR. BRINSON: Well, Your Honor, we – we haven't seen any evidence of the emergency. We don't know what the emergency was. We're talking about –

THE COURT: Okay.

MR. BRINSON: – not the ultimate relief, Your Honor, but the temporary restraining order, which was entered without notice.

THE COURT: I'm not going to require her to take the stand in view of what I reported to counsel on the record.

MR. BRINSON: May I –

THE COURT: All right. I – I don't mean to cut you [38] off. Go ahead.

MR. BRINSON: No, sir. May I proffer what we would expect to show?

THE COURT: With the testimony of Ms. Colston?

MR. BRINSON: Yes.

MS. COLSTON: I'm going to object to anybody thinking they know what I'd say.

MR. BRINSON: No, I don't mean that. I mean to what happened and what didn't happen.

THE COURT: At the hearing?

MR. BRINSON: Yes, sir.

THE COURT: Well, you may proffer it, yes, sir.

MR. BRINSON: Yes, sir. Well, we believe that Your Honor was not informed of the existence of the lawsuit before Judge Shoob in the United States District Court in Atlanta, which covers the same issues, so that th – which had been ongoing for –

THE COURT: Let me answer that.

MR. BRINSON: – seven months.

THE COURT: There – there was a reference to that lawsuit.

MR. BRINSON: Sir?

THE COURT: There was a reference to that lawsuit, and I think we brought that up when we had one of the hearings and counsel for the defendants at that time [39] brought me up to date on the most recent rulings and gave me the one entered on January of 2001.

MR. BRINSON: Is Your Honor saying that that was mentioned – that was –

THE COURT: Not the January of 2001, but there was a mention made, and – of the lawsuit before Judge Shoob.

MR. BRINSON: That – that was made at the –

THE COURT: Yes.

MR. BRINSON: – temporary hearing? At the *ex parte* hearing?

THE COURT: It was mentioned, yes, sir.

MR. BRINSON: Well, Your Honor, then our – our position is that we – we don't know what the showing of the emergency was.

THE COURT: Okay.

MR. BRINSON: What change – I mean that – we – we – we believe that we – we could show that, number one, there were ongoing regulatory scrutiny of D.L. Pimper, that there was an existing lawsuit that had been there for seven months in the United States District Court in Atlanta covering the very same issues, and we don't know what showing was made to Your Honor that there was any sudden emergency, that anything had changed that caused the issuance of these extraordinary remedies.

THE COURT: All right, sir.

[40] Now, do you want to respond, Ms. Colston?

MS. COLSTON: If I may, Your Honor. I have started losing my voice yesterday, and I apologize for the way I sound.

So far as the requirements of the statute that allows in TR – in temporary injunction, 9-11-65, we're proceeding, and this is what the defendants keep forgetting, we're proceeding under a RICO action, which is 16-14-7. That statute in Section B says it's governed by Chapter 11, Title 9 of the Georgia Civil Practice Act, except to the extent that the rules of procedure are stated in this chapter.

That chapter of RICO states the rules of procedure that must be complied with. Only when those rules do not apply do we even look to 9-11-65, and that rule provides for what the State sought in here through the *ex parte* hearing, as the Court's aware, in 9 – 9 – 16-14-7.

And I'm not – there was mentioned that the bond is required by 16-14-6. We have not proceeded under 16-14-6. I don't think anywhere in the complaint it's proceeded under that statute. I don't want to mislead anybody. I – you know, we may end up amending the complaint, should this action sustain, and ask for some of the remedies contained in that – that *Code* section, but when 16-14-6 talks about the – the bond that's required, [41] if the Court would look at the – at the paragraph (and I would like the opportunity to brief this issue, since we've had such short notice on all this), but looking at that paragraph, you can look at that paragraph and see that the first thing it says is a person, any aggrieved person or the State may bring this action, and, then, it goes on and talks about bond. Your Honor, I'll check and see if I can find a case where the State's had to post a bond, but I don't know of any right offhand.

As far as notice goes, we presented the testimony and the evidence that we felt was in – I don't know what four and a half minutes could have changed as far as getting down to the courthouse, but I do know that time was of the essence and you can't sit around – you can't come in to have days and days of delay, which – and let assets and people's money get gone, so, Your Honor, that's all I'd say about that right now.

If I would have the opportunity, if the Court would tell us what issues you would like to have briefed before you make your decision, I would like the opportunity to do that.

THE COURT: Now, then, y'all want to swap out?

MR. BRINSON: Yes, Sir.

THE COURT: All right.

MR. SAWICKI: Your Honor, the first point in reply [42] to Ms. Colston's assertion that she's not proceeding under 16-14-6, you will note on page 14 of your – the order that you signed on January 29th that you have by order any and all licenses, permits, authorizations issued to any defendants by the Commissioner of Securities of the State of Georgia, et cetera, are hereby suspended.

The only provision for that remedy is in 16-14-6. Therefore, under the statute, a bond, a proper bond was required. As admitted, no bond was provided.

No. 2, as we noted under 65(b) of the Georgia Civil Practice Act, there are two thing – two critical jurisdictional things that Ms. Colston failed to do. Number one, she failed to certify in writing the reasons for not giving notice, and, number two, the record does not reflect any specific facts by affidavit or verified complaint of the – of whether the defendants were concealing or disposing of assets. The sole reference to that essential allegation to the awarding of this extraordinary relief is found in paragraph 37 of the complaint that Mr. [sic] Colston personally verified.

It simply says, unless restrained and enjoined by the Court, the defe – excuse me – the defendants will conceal and dispose of such real and personal property, including money. Your Honor, under no construction by [43] anyone is that a recitation of specific facts. If there's no affidavit in the file, then the only source for that evidence is Ms. Colston. She verified on information, knowledge, and belief. We are entitled to ascertain exactly what she knew, was informed of, and believed when she signed that verification and presented this complaint to Your Honor.

And, Your Honor, in addition to those points, in rebuttal to Ms. Colston's position and in addition to seeking to call her on cross-examination to ascertain the knowledge, information, and belief that form the basis for her certification as Mr. Brinson mentioned, we would like to call on cross-examination Michael Lambros, who is the attorney for the receiver, and explore the basis for his involvement and his knowledge of facts that form the basis of this petition.

THE COURT: All right. I'm not going to do that now.

MR. SAWICKI: Your Honor, may I proffer?

THE COURT: Sure.

MR. SAWICKI: If Mr. Lambros were called, we would be able to ascertain that it was he and his office, alone or in conjunction with others, who prepared this complaint, prepared this proposed order, prepared the discovery that was served on the defendants, and was [44] otherwise involved in the – the gathering the information and the preparation of this lawsuit.

We would also expect to be able to show that there were communications between the receiver, the District Attorney, and others that preceded the filing of this complaint that would reveal, most likely, the true motives of why this action was taken at this particular time.

We would further expect to show that the receiver did no investigation, nor did the District Attorney, concerning what assets were owned by the defendants prior to the filing of this complaint. They easily could have determined what assets they had in terms of cars, houses, business properties, and assets from the public records, and they would have been able to show that those liens, UCC liens, security deeds, and so forth would have revealed that all of the assets were fully encumbered, as indicated by the lawyer from the bank that we heard from earlier today.

We would also expect to show that the receiver has proposed to dissolve the recei – receivership for exactly that reason. That – that proposal was made yesterday. For us to have gone through the hell we've gone through this last week, only to receive that proposal yesterday is astounding to me, and I think that undermines the [45] legitimacy of this entire proceeding.

Thank you.

THE COURT: All right, sir. As I stated, I – I think that the defendants are entitled to have a full hearing, as is contemplated by the law. The District Attorney has made some statements that she's as ready as she can be, due to the lateness of the hour of receiving the notices here, but, going back again, the complaint is not properly verified, as required by the Civil Practice Act, but there is a provision that that can be overcome by testimony that is given under oath.

So far as the notice is concerned, I was concerned myself, and, as I stated to counsel up here, with two things: 1) The – and there was testimony under oath given to me by the District Attorney and two police officers. I was concerned as to the protection of the assets that were being held by – by the Pimper Group of being lost. I was concerned about the loss of assets, and there was testimony given about the possibility of flight. I didn't want to close down a business, and I tried to work out an amended order with you-all, and I know everybody did that in good conscience. But, anyway, I did it reluctantly to issue the order that we're complaining – that everyone's discussing now.

So far as the bond is concerned, I think under the [46] Civil Practice Act, it says the Court may require the giving of a bond with security before doing it, and that's in Section (c) – (c).

Now, then, I think I have motions pending for the appointment of a guardian ad litem. There is an – an appearance made by counsel for First Floyd Bank, I think. There are a number of other motions pending.

I'm going to deny your motion to dismiss. I'm going to set down this matter for a hearing, at which time – on Friday morning at 9:30, at which time the State will have to be in a position to submit evidence to the Court so we – I can then de – decide whether to vacate the injunction and the restraining order and the appointment of a receiver or to continue it on a modified basis.

The other matters that are now pending before the Court, I'll address those at that time.

MR. BRINSON: If Your Honor please, do I understand that you're denying our motion to dissolve the –

THE COURT: Yes.

MR. BRINSON: – temporary restraining order?

THE COURT: Yes. And I'm going to have a full evidentiary hearing so that you can – you and I can hear testimony Friday morning, and, then, I'll decide what to do at that time, but, in view of the fact, what the bank has requested, and an amendment of the restraining order [47] so you can proceed with the foreclosure, you'll have to be back Friday morning.

MS. ROGERS: Okay. Your Honor, so you're saying that the – the bank needs to bring that motion at that time, on Friday?

THE COURT: Well, I'm going to take in consideration the whole thing. If you want to be here Friday morning, but it –

MS. ROGERS: Okay. I mean we don't have a problem with the motion with the – the receivership being vacated or modified. We just would want to – the bank to get possession of collateral, since it's their – their collateral.

THE COURT: Well, be here Friday morning at 9:30.

MS. ROGERS: Okay. I understand, Your Honor.

THE COURT: And I'll have to make some final disposition. I'll accept no statements that we're not ready yet, because we've got to go at that time.

Court's adjourned.

MR. SAWICKI: Thank you, Your Honor.

[Whereupon, these proceedings were concluded at 4:38 p.m.]

[Defendant's Exhibit No. 1 Omitted In Printing]

COURT REPORTER'S CERTIFICATE

COUNTY OF FLOYD,
STATE OF GEORGIA:

I, Fay Frankland, do hereby certify that the foregoing record pages 2 through 48, is a true, complete, and correct transcription of the proceedings reported by me in the case of the State of Georgia *ex rel.* Tami P. Colston, District Attorney for the Rome Judicial Circuit, versus David L. Pimper, Amy F. Pimper, D.L. Pimper Group, Inc., and Wall Street Creations, Ltd., Civil Action File No. 01CV21058-3, in the Superior Court for the County of Floyd, State of Georgia, on Tuesday, February 6, 2001.

This 9th day of February, 2001.

s/____________________
FAY FRANKLAND, C.C.R. B-332
OFFICIAL COURT REPORTER
ROME JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE OF GEORGIA *ex rel.* TAMI P. COLSTON, District Attorney for the Rome Judicial Circuit, Plaintiff, v. DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, INC., and WALL STREET CREATIONS, LTD., Defendants.	CIVIL ACTION FILE NO. 01-CV-21058-3

COMPLAINT

(Filed Jan. 29, 2001)

The State of Georgia ex *rel.* Tami P. Colston, District Attorney for the Rome Judicial Circuit, files this Complaint against the Defendants named herein pursuant to Sections 16-14-7(m) and 16-14-9 of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.*, (hereinafter "the Georgia RICO Act"), showing this Court, in support thereof, the following:

JURISDICTION, VENUE AND PARTIES

1.

Defendant David L. Pimper is subject to the jurisdiction of this Court and may be served with process at 488 Sproull Road, S.E., Rome, Georgia 30161.

2.

Defendant Amy F. Pimper is subject to the jurisdiction of this Court and may be served with process at 488 Sproull Road, S.E., Rome, Georgia 30161.

3.

Defendant D. L. Pimper Group, Inc. is a Georgia corporation authorized to do business in this State and which is subject to the jurisdiction of this Court. Service can be perfected upon its registered agent David L. Pimper at 501 East First Street, Rome, Georgia 30161.

4.

Defendant Wall Street Creations, Ltd. is a Georgia corporation authorized to do business in this State and which is subject to the jurisdiction of this Court. Service can be perfected upon its registered agent David L. Pimper at 501 East First Street, Rome, Georgia 30161.

5.

This Court has jurisdiction over the subject matter of this action pursuant to Sections 16-14-6 and 16-14-9 of the Georgia RICO Act.

6.

This Court is the proper venue for this action pursuant to Art. 6, §2, ¶¶ 3, 4, and 6 of the Constitution of the State of Georgia.

FACTUAL BACKGROUND

7.

Beginning in or about 1992 or 1993 and continuing through the date of the filing of this Complaint, Defendant David L. Pimper and his wife Defendant Amy F. Pimper ("the Pimpers") have, directly and indirectly, managed, controlled, directed, and supervised the business operations and activities of Defendant D. L. Pimper Group, Inc. The Pimpers have benefited financially from the revenues derived from the business activities of Defendant D.L. Pimper Group, Inc, and they have utilized those revenues to acquire and maintain, directly and indirectly, interests in property and assets including, without limitation, the business known as Defendant Wall Street Creations, Ltd.

8.

As part of its business operations during the foregoing period of time, Defendant D.L. Pimper Group, Inc. operates what is termed an "asset allocation" service. The Pimpers, and various persons acting under their direction and supervision, solicit clients to participate in the "asset allocation" service. Clients are told that, in exchange for a fee of between .75% and 1.5% of the value of their investment portfolio, Defendant D.L. Pimper Group, Inc. will conduct periodic, sophisticated analyses of the clients' accounts to determine whether the assets in those accounts are properly allocated.

9.

As part of the marketing media used to promote the "asset allocation" service, the Pimpers, and those acting for and on their behalf, primarily utilize a "flip chart," which consists of fifteen (15) pages that provide information about Defendant D.L. Pimper Group, Inc.'s management philosophy on modern portfolio theory and general market information including brief overviews on diversification and risk.

10.

The Pimpers, and those acting on their behalf, further represent to such clients that Defendant D.L. Pimper Group, Inc. has "developed statistical and mathematical tools for quantifying risk and reward in investment portfolios," and that, in exchange for the payment of the foregoing fees, Defendant D.L. Pimper Group, Inc. will implement four key elements derived from that research development in evaluating such clients' investment portfolios. Specifically, clients are told that such elements will consist of an evaluation of annual returns, average variation, Sharpe ratios and correlation coefficients.

11.

The Pimpers, and those acting on their behalf, further represent to such clients that their accounts will be reviewed and the four key elements described above will be applied and evaluated with respect to those accounts on a weekly basis.

12.

As a consequence of the solicitation efforts of the Pimpers and those acting for and on their behalf during the foregoing period of time, Defendant D.L. Pimper Group, Inc. presently has approximately 370 client portfolios representing in excess of $39 million "under management." On information and belief, Defendant D.L. Pimper Group, Inc. has been paid between $300,000 and $400,000 annually in fees by its "asset allocation" service clients for each of the years from at least 1996 forward.

13.

Although it has charged and collected substantial fees for its "asset allocation" service neither the Pimpers nor Defendant D.L. Pimper Group, Inc. performs or has performed the sophisticated account analyses which it has represented to its clients that it will provide. Specifically, these Defendants have not developed any statistical and mathematical tools for quantifying risk and reward in investment portfolios, and they do not apply the "four key elements" described in Paragraph 10 hereinabove in managing investment portfolios, although they falsely represent to clients that they do.

14.

The Pimpers and Defendant D.L. Pimper Group, Inc. further falsely represent to clients that accounts in the "asset allocation" program are reviewed "at least on a weekly basis" when in fact no such weekly review occurs. Moreover, instead of performing the sophisticated statistical and mathematical analyses which they represent to their "asset allocation" clients they will and do perform on their portfolios, the Pimpers and Defendant D.L. Pimper Group, Inc. give investment advice based on such data as a particular fund's quarter end performance.

15.

The Pimpers and Defendant D.L. Pimper Group, Inc. further falsely represent to clients that they develop rates of return and the risk level necessary to achieve an investor's personal goals, when in fact they do not develop any such rates of return or risk levels for clients.

16.

The Pimpers and Defendant D.L. Pimper Group, Inc. further falsely represent to clients that various technical and fundamental aspects of the securities markets will be analyzed in order to determine strategic investment allocation of the clients' capital, when in fact no such technical and fundamental analyses of the securities market are performed.

17.

The Pimpers and Defendant D.L. Pimper Group, Inc. further falsely represent to clients that they provide investment advice on equity securities, corporate debt securities, commercial paper, certificates of deposit, municipal securities, and partnerships when in fact no investment advice is provided on these instruments and investments.

18.

The Pimpers and Defendant D.L. Pimper Group, Inc. further fail to disclose to clients that, in addition to the fees which the clients pay to these Defendants for their alleged investment advice, mutual funds and variable annuities also pay management fees to an investment adviser such as D.L. Pimper Group, Inc.

19.

The Pimpers and Defendant D.L. Pimper Group, Inc. represent to their clients that such clients are "under no obligation to purchase products we recommend, or to purchase products with (sic) either through us or through Royal Alliance Assoc, Inc.," but these Defendants fail to disclose that if such clients do not accept these Defendants' product recommendations, Defendant D.L. Pimper Group, Inc. will not manage their assets.

20.

An examination performed by the Branch of Investment Company and Investment Adviser Examinations of the United States Securities and Exchange Commission ("SEC") as of January 19, 2000 confirms that Defendant D.L. Pimper Group, Inc. wrongfully charges clients in the "asset allocation" program fees for services which are not performed; provides such clients false and misleading information concerning the "asset allocation" program; and misleads clients into believing that they will receive the sophisticated asset allocation services described hereinabove. A copy of the SEC's letter of examination is attached hereto and incorporated herein by reference as Exhibit "A."

21.

On information and belief, the Pimpers and Defendant D.L. Pimper Group, Inc. have since 1991 caused a Form ADV to be filed annually with the Office of the Commissioner of Securities of the State of Georgia falsely representing, *inter alia*, that Defendant D.L. Pimper Group, Inc. reviews the accounts of its "asset allocation" program clients weekly; develops rates of return and risk levels necessary to achieve such clients' personal investor goals; and analyzes for such clients the various technical and fundamental aspects of the general securities market in order to determine the strategic investment allocation for such client's capital, when in fact no such activities take place, although substantial fees are charged and collected therefor.

COUNT ONE

Violation of the Georgia Racketeer Influenced and Corrupt Organizations Act RICO, O.C.G.A. Section 16-14-1 *et seq.*

22.

Plaintiff realleges and incorporates by reference the allegations of Paragraphs I through 21 of this Complaint as if the same were fully set forth herein.

23.

Each of the Defendants is a "person" for purposes of O.C.G.A. Section 16-14-4.

24.

The association in fact of the individual and corporate Defendants with one another, and the various illicit acts, practices, transactions, and activities engaged in by them as described hereinabove, constitutes an "enterprise" as that term is used in O.C.G.A. Section 16-14-3(6).

25.

Beginning in or about 1992 or 1993 and continuing to the present the individual and corporate Defendants, through their association in fact with one another as described hereinabove, unlawfully and through a pattern of racketeering activity and from the proceeds derived therefrom acquired and maintained, directly and indirectly, interest in and control of various enterprises, real property, personal property, and money in violation of O.C.G.A. Section 16-14-4(a).

26.

Beginning in or about 1992 or 1993 and continuing to the present, the individual and corporate Defendants, through their association in fact with one another as described hereinabove have conducted and participated, directly and indirectly, in an enterprise whose purpose was to acquire and maintain, directly and indirectly, control of real and personal property, including money, in violation of O.C.G.A. Section 16-14-4(b).

27.

Beginning in or about 1992 or 1993 and continuing to the present, the individual and corporate Defendants, through their association in fact with one another as described hereinabove, unlawfully and through a pattern of racketeering activity and from the proceeds derived therefrom, conspired and endeavored to violate O.C.G.A. Sections 16-14-4 (a) and (b) in violation of O.C.G.A. Section 16-14-4 (c).

28.

Each of the Defendants conducted or participated in the affairs of the foregoing "enterprise" through a "pattern of racketeering activity" as that term is defined at O.C.G.A. Section 16-14-3(8). Specifically, the Defendants have committed numerous, related acts of theft, falsifications in connection with matters within the jurisdiction of an agency of state government, and violations of the Georgia Securities Act of 1973, as amended, under the laws of the State of Georgia. In addition, the Defendants have committed numerous, related acts of frauds and swindles, fraud by wire, and transportation in interstate commerce of money of the value of $5,000 or more knowing the same to have been taken by fraud, which acts are conduct defined as "racketeering activity" under federal law (Title 18 U.S.C. Section 1961) and which are incorporated as predicate acts under the Georgia RICO Act pursuant to O.C.G.A. Section 16-14-3(9)(A)(xxix).

29.

The Defendants' conduct constitutes a "pattern of racketeering activity" under the Georgia RICO Act and includes the following predicate acts:

(a) Violation of Article I of Chapter 8 of Title 16 of the Official Code of Georgia relating to theft;

(b) Violation of Article 2 of Chapter 10 of Title 16 of the Official Code of Georgia, specifically Code Section 16-10-20, relating to false statements and writings, concealment of facts, and fraudulent documents in matters within the jurisdiction of any department or agency of state government, to wit, the Office of Commissioner of Securities of the State of Georgia;

(c) Violation of Code Section 10-5-24 relating to violations of the Georgia Securities Act of 1973, as amended, specifically violation of Code Sections 10-5-12 (c) and 10-5-12(h);

(d) Violation of Title 18 U.S.C. Section 1341 relating to the use of the United States mail to perpetrate frauds and swindles;

(e) Violation of Title 18 U.S.C. Section 1343 relating to wire fraud; and

(f) Violation of Title 18 U.S.C. Section 2314 relating to the transportation in interstate commerce of money of the value of $5000 or more knowing the same to have been taken by fraud;

30.

All of the predicate acts of racketeering activity under Georgia RICO occurred after July 1, 1980, and the last of such incidents occurred within four years after the commission of a prior incident of racketeering activity.

31.

As a direct and proximate result of the Defendants' violations of O.C.G.A. Section 16-14-4(a) and (b), Plaintiff is entitled to the relief provided for in O.C.G.A. Section 16-14-6(a)(1) through (5).

32.

Plaintiff is also entitled to recover the costs and attorneys' fees of investigation and litigation reasonably incurred in connection with this action pursuant to O.C.G.A. Section 16-14-6(c).

33.

Plaintiff is further entitled to obtain forfeiture to the State of Georgia of all property of every kind used or intended for use in the course of, derived from, or realized through the foregoing pattern of racketeering activity pursuant to O.C.G.A. Section 16-4-7(a).

34.

As a result of their violation of O.C.G.A. Section 16-14-4(b), the Defendants should also be required to divest themselves of any interest in any real and personal property which was paid for, directly or indirectly, from the proceeds of the foregoing racketeering activities or which constitutes such proceeds.

COUNT TWO

Injunction

35.

Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 34 of this Complaint as if the same were fully set forth herein.

36.

Upon information and belief, the Defendants have in their possession, custody, and control both personal and real property, including money, obtained and derived through the unlawful acts, practices, and transactions more particularly described hereinabove.

37.

Unless restrained and enjoined by the Court, the Defendants will conceal and dispose of such personal and real property, including money.

38.

This Court should temporarily and permanently enjoin the Defendants from disposing, conveying, transferring, assigning, or otherwise alienating any of their property, both personal and real, including money, until further Order of this Court.

COUNT THREE

Appointment of a Receiver

39.

Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 38 of this Complaint as if the same were fully set forth herein.

40.

As a consequence of their unlawful acts, practices, and transactions as more fully set forth hereinabove, the Defendants have, directly and indirectly, acquired and accumulated property and assets, including money, with monies and funds directly traceable to and derived from criminal activity.

41.

Plaintiff is entitled to the appointment of a receiver with all the power and authority generally exercisable by receivers under the laws of this State, including, without limitation, the power and authority:

(a) to take immediate custody, control, and possession of the assets of the Defendants;

(b) to marshal and account to this Court for the assets so seized;

(c) to preserve and protect such assets pending further order of this Court; and

(d) to take such action as may be directed by the Court to insure the availability of such assets to respond to any judgment the Court may enter in this action.

WHEREFORE, Plaintiff prays for relief against the Defendants as follows:

(a) that under COUNT ONE:

(i) the Court, pursuant to O.C.G.A. Section 16-14-6(a)(1), order the Defendants to divest themselves of and forfeit to Plaintiff any interests in any enterprise, real property, and personal property acquired by them, directly and indirectly, from the acts, practices, and transactions in which they have engaged through their violations of the Georgia RICO Act regardless of whether title to such property and assets is held by them legally, equitably, or beneficially, and that the Defendants provide a full and complete accounting of all monies obtained by them as well as an accounting of the expenditure of such proceeds to purchase, acquire, and obtain all property of whatever kind and description and wherever located;

(ii) the Court, pursuant to O.C.G.A. Section 16-14-6(a)(2) impose reasonable restrictions upon the future activities and investments of the Defendants including, but not limited to, prohibiting them from engaging in the same type of endeavors as the enterprise alleged hereinabove;

(iii) the Court, pursuant to O.C.G.A. Section 16-14-6(a)(3), order the dissolution of any RICO enterprise controlled, owned, or operated by the Defendants;

(iv) the Court, pursuant to O.C.G.A. Section 16-14-6(a)(4), order the suspension or revocation of any license, permit, or prior approval granted to any of the Defendants by any agency of the State of Georgia;

(v) the Court, pursuant to O.C.G.A. Section 16-14-6(a)(5), order the forfeiture of the corporate charters of all the corporate Defendants;

(b) that under COUNT TWO the Court temporarily, preliminarily, and permanently restrain and enjoin the Defendants from disposing, conveying, transferring, assigning, or otherwise alienating any of their property, both personal and real, including money, until further Order of this Court;

(c) that under COUNT THREE the Court appoint a receiver over the property of the Defendants, and that such receiver be vested with all the power and authority generally exercisable by receivers under the laws of this State, including, without limitation, the power and authority:

(i) to take immediate custody, control, and possession of the assets of the Defendants;

(ii) to marshal and account to this Court for the assets so seized;

(iii) to preserve and protect such assets pending further order of this Court; and

(iv) to take such action as may be directed by this Court to insure the availability of such assets to respond to any judgment the Court may enter in this action;

(d) award Plaintiff the attorneys' fees and costs incurred in the investigation and litigation of this action; and

(e) grant Plaintiff such other and further relief as the Court deems just and equitable.

This 29th day of January, 2001.

Respectfully submitted,

/s/ Tami Colston
TAMI P. COLSTON
Georgia Bar No. 179315
District Attorney

Office of the District Attorney
Rome Judicial Circuit
3 Government Plaza, Suite 302
Rome, Georgia 30161
(706) 291-5210

EXHIBIT A

(LOGO) UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
ATLANTA DISTRICT OFFICE
3475 LENOX ROAD, N.E.
SUITE 1000
ATLANTA, GEORGIA 30326-1232

January 19, 2000

David L. Pimper, President
D.L. Pimper Group, Inc.
501 East First Street
Rome, GA 30161

Re: D.L. Pimper Group, Inc.
File No. 801-40668

Dear Mr. Pimper:

The examination of the books and records of D. L. Pimper Group, Inc. ("Registrant") conducted pursuant to Section 204 of the Investment Advisers Act of 1940 ("Advisers Act") disclosed the following:

Advisory Contracts

Registrant uses one standard contract, the "Investment Planning Agreement." This nor discretionary contract states that Registrant "shall at no time have discretionary authority over Client funds, nor shall it take custody of Client funds." Although Registrant states that it will not have discretionary authority, Registrant maintains limited power of attorney forms and written authorizations signed by clients which provide Registrant with discretionary investment authority over the clients' assets.[1] In addition, transactions for clients' portfolios are typically effected at the advisory representative's discretion. Clients are not contacted for their approval prior to the placement of trades. The inclusion of this statement in the advisory contract is not consistent with the advisory service being provided to the client. Consequently, Registrant may be in violation of Section 206(2) of the Advisers Act.[2]

Marketing/Performance Calculation

Rule 206(4)-1(a)(5) under the Advisers Act makes it unlawful for any investment adviser, directly or indirectly, to publish, circulate, or distribute any advertisement which contains any untrue statement of material fact, or which is otherwise false or misleading.

Registrant uses various marketing media to promote its business. These include an asset allocation flip chart ("Flip Chart"), cable television advertisements, radio spot advertisements, an Internet web site and advertisements in local publications. Registrant also markets its services through free seminars. The Flip Chart is the primary marketing document and consists of 15 pages that provide information about Registrant's management philosophy on modern portfolio theory and general market information including brief overviews on diversification and risk.

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[1] Please note that Rule 204-2(a)(8) under the Advisers Act requires that investment advisers maintain a list or other record of all accounts in which the investment advisers vested with any discretionary power with respect to the funds, securities or transactions of any client.

[2] Section 206(2) states that it is unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to engage [sic] any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

On the front page of the Flip Chart, Registrant states that it is "[t]he choice of more than one thousand investors." As a registered investment adviser, Registrant has approximately 370 client portfolios. There is no evidence that 1,000 investors have advisory accounts with Registrant. Therefore, this statement is misleading.

On page three, entitled "Modern Portfolio Theory," the following two statements are included:

> Modern Portfolio Theory provides a substantial base of research from which we have developed statistical and mathematical tools for quantifying risk and reward in investment portfolios.
>
> We use four key elements in evaluating investment portfolios: average returns, average variation, Sharpe ratios, and correlation coefficients.

Ernest Smith, an advisory representative, stated that Registrant has not developed any statistical or mathematical tools. According to Mr. Smith, Registrant's advisory representatives only discuss the statistical tools and key elements used in portfolio investing with prospective clients. Registrant's staff provides an explanation to prospective clients on how the four elements can be used in the investment process. While Registrant states that it has developed statistical and mathematical tools "for quantifying risk and reward in investment portfolios,' Registrant has not developed any statistical and mathematical tools. Registrant also does not use the above "four key elements" in managing investment portfolios. The use of these statements in Registrant's Flip Chart is misleading.

The Flip Chart on Page 15, which is entitled "Description of Services," in the second paragraph, states, in part, that Registrant "will analyze various technical and fundamental aspects of the general securities market in order to determine the strategic allocation of the client's capital." During the examination, the examiner reviewed the research files for two of Registrant's three advisory representatives – Ernest Smith and Dean Covington. Neither Mr. Smith nor Mr. Covington maintained any documentation that indicated they had analyzed technical and fundamental aspects of the securities market. Mr. Covington's research consisted of prospectuses and sales information provided by the mutual fund companies and companies providing variable annuity products. In Mr. Smith's research file, articles from 1993 to 1999 were maintained. For 1999, he had nine articles in his research file. These consisted of newspaper articles and marketing materials. The staff also reviewed 35 client files. Neither the research files nor the client files contained any worksheets, documents or analyses of technical and fundamental aspects of the securities market as it relates to allocating client portfolios.

In addition, the staff reviewed portfolio transactions for the first and second quarters of 1999. The review disclosed that in most instances, lower performing funds were replaced with higher performing funds. Although Registrant indicates that statistical and mathematical analyses are used in managing portfolios, the staff's analysis disclosed that Registrant makes investment decisions based on the particular fund's quarter end performance. Consequently, the inclusion of the above statements in Registrant's Flip Chart is misleading and in violation of the anti-fraud provisions of Sections 206(1) and 206(2) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder.[3]

The staff's review of Registrant's marketing materials and client files disclosed additional violations of Rule 206(4)-1(a)(5). An advertisement in the Rome High School Sports Poster identifies you as Registrant's president and also as a "Registered Investment Advisor." In some correspondence to clients, "Registered Investment Advisor" is printed directly beneath your name and signature. In another instance, your title is indicated as "Registered Investment Advisor" on a client's fee authorization form. These statements are misleading and in violation of Rule 206(4)-1(a)(5) under the Advisers Act, because they may lead a client to believe that you are a registered investment adviser when in fact Registrant is the registered investment adviser.

Custody

Each client's funds and securities are maintained in their respective custodial account. Registrant receives its quarterly advisory fee by directly billing the account custodian or directly billing the client. Ordinarily, an investment adviser who receives its fees directly from the custodian will not have to comply with the provisions of Rule 206(4)-2 under the Advisers Act if it conforms with the procedures established by the Division of Investment Management ("Division") in its letter to Lawwill, Sena & Weller, Inc. ("Lawwill") (publicly available April 10, 1983) Lawwill states, generally, that the adviser will not be deemed to have custody or possession of a client's funds or securities when the adviser receives its advisory fees from the client's custodian if:

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[3] Section 206(2) and Rule 206(4)-1(a)(5) were discussed previously. Section 206(1) makes it unlawful for any investment adviser to employ any device, scheme, or artifice to defraud any client or prospective client

(1) The client provides a written authorization permitting advisory fees to be paid directly from the account held by the custodian;

(2) The adviser sends to the client and the custodian simultaneously, a billing statement which indicates the amount of the advisory fee, the value of the client's assets on which the fee was calculated, and the specific manner in which the fee was calculated; and

(3) The custodian agrees to provide the client a statement, at least quarterly, which identifies all amounts deducted from the account, including the amount of advisory fees paid directly to the adviser.

Alternatively, Registrant may apply the safeguards outlined in the Division's letter to John B. Kennedy ("Kennedy") (publicly available June 5, 1996). Kennedy modified the second condition of Lawwill so that an adviser may send the custodian a bill indicating only the amount of the fee if it makes two disclosures to the client. The adviser must disclose to the client 1) that it is the client's responsibility to verify the accuracy of the adviser's fee calculation and 2) that the custodian will not determine whether the fee is properly calculated. The adviser must also comply with the other conditions described above.

Registrant submits individual billing statements to client's who pay their management fees directly to Registrant. These billing statements indicate the specific manner in which the fees are calculated. However, billing statements are not sent to clients whose fees are deducted from the custodial account. A blank "Fee Liquidation Authorization Form" ("Form") signed by the client is maintained in the client's file. Once Registrant calculates the advisory fee, the amount is entered on the signed Form and submitted to the custodian for payment of advisory fees. The Form indicates the amount of the advisory fee but does not indicate the value of the client's assets on which the fee was calculated or the specific manner in which the fee was calculated. Registrant is not in compliance with item two of Lawwill because it does not send a copy of the billing statement to the client and it does not include the required information on the billing statement to the custodian.

The staff reviewed several of the custodial statements of clients whose management fees are deducted from their custodial account. In many instances, the account statements indicate withdrawal or deduction from the account; however, the statements do not identify the management fee deductions as such. The account statement does not make a distinction between a client's withdrawal and a management fee deduction and consequently, is not in compliance with the third requirement of Lawwill.

Finally, Registrant's maintenance of the pre-signed and blank Forms provides Registrant with broad authority to access clients' assets. By maintaining the Forms in this manner, Registrant is deemed to have custody. Therefore, Registrant must revise its procedures to comply with the requirements of Lawwill or Kennedy or comply with the custody provisions of Rule 206(4)-2 under the Advisers Act.

Conflicts of Interest

Section 204A of the Advisers Act requires that every investment adviser establish maintain, and enforce written policies and procedures to prevent the misuse of material non-public information by the investment adviser or any person associated with the adviser. The policy and procedures must be reasonably designed, taking into consideration the nature of the investment adviser's business to prevent violations of the Advisers Act and the Securities Exchange Act of 1934. The examination disclosed that Registrant has not established any such policies or procedures. In addition there are no established procedures for reviewing employees' personal securities transactions for potential conflicts of interest.

Books and Records

Rule 204-2(a) under the Advisers Act requires an investment adviser to make and keep true, accurate and current certain books and records relating to its investment advisory business.

Rule 204-2(a)(3) under the Advisers Act requires the preparation and maintenance of a memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any order or instruction. The rule sets forth the information required to be on each order memorandum. The staff randomly selected five order tickets. The order tickets were reviewed for compliance with the requirements of Rule 204-2(a)(3). Two order tickets failed to indicate the person placing the order, one failed to provide the complete date of entry and all of the order tickets failed to include that they were executed pursuant to discretionary authority. These are all items required by the rule; consequently, Registrant violated Rule 204-2(a)(3).

Rule 204-2(a)(7) under the Advisers Act requires that an investment adviser prepare and maintain originals of all written communications received and copies of all written communications sent by the investment adviser relating to the placing or execution of any order to purchase or sell any security. Registrant does not maintain all account statements for each client's account. The staff requested copies of quarterly custodian statements for a client account. According to Jayne Brown, the office manager, Registrant only maintains the year-end custodian statements. At the end of the year, the quarterly statements are discarded. Therefore, Registrate was not in compliance with Rule 204-2(a)(7) under the Advisers Act.

Rule 204-2(a)(14) under the Advisers Act requires that advisers maintain a copy of each written statement and each amendment or revision thereof, given or sent to any client or prospective client in accordance with the provisions of Rule 204-3 under the Advisers Act. The rule also requires that investment advisers maintain a record of the dates that each written statement, and each amendment or revision thereof, was given, or offered to be given, to any client or prospective client.[4] Registrant's advisory agreement is the primary record indicating the date of the client's initial receipt of Form ADV, Part II. The advisory agreement for J.D. Newton is not dated. Consequently, Registrant did not maintain a record of the date that Form ADV, Part II was initially provided to J.D. Newton.

Rule 204-2(e)(2) requires that partnership articles and any amendments thereto, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, be maintained in the principal office of the investment adviser. These records must be preserved until at least three years after termination of the enterprise. During the examination, the staff requested the articles of incorporation for Registrant. Registrant's staff was unable to locate the documents. Registrant's attorney was contacted and also was unable to locate a copy of the articles of incorporation. Registrant's failure to maintain the articles of incorporation in its office is a violation of Rule 204-2(e).

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[4] Registrant uses Form ADV, Part II to comply with the requirements of Rule 204-3.

Form ADV Brochure Disclosure and Delivery

Rule 204-1(b) under the Advisers Act requires an investment adviser to amend its Form ADV if the information contained therein becomes inaccurate. Certain inaccuracies require an amendment to be filed promptly, while others permit an amendment to be filed within ninety days of the end of the investment adviser's fiscal year. Registrant's Form ADV should be amended to include the following:[5]

Part I

Item 8	Registrant failed to complete Schedule A.
Item 12	Registrant failed to complete a Schedule D for each individual who is a control person named in Part I Item 10 and for each member of applicant's investment committee that determines general investment advice to be given to clients. A Schedule D should be completed for you, Ernest Smith, Mike Beck and Dean Covington.
Item 13	Registrant indicates that it does not have custody of advisory clients' funds and securities. This should be checked yes. Registrant has not complied with applicable no-action letters related to custodial billing of clients'

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[5] We also request that Registrant thoroughly review all information contained in its Form ADV. All inaccurate, incomplete or out-dated answers should be amended, and the revised Form ADV should be filed with the Commission in Washington, DC.

accounts. As a result of these arrangements, Registrant does have custody.

Item 17A Registrant indicates that only one part-time employee performs investment advisory functions. Currently, four employees perform investment advisory functions.

Part II

Item 3 Registrant indicates that investment advice is provided on equity securities, corporate debt securities, commercial paper, certificates of deposit, municipal securities, partnerships and other types of investments. Registrant does not provide advice on these investments.

Item 4. Registrant indicates that the methods of analysis used include charting, fundamental and technical analysis. Registrant does not use any of these methods of analysis.

Item 11 Registrant's disclosure states that all accounts that are being asset allocated and re-balanced are reviewed at least on a weekly basis. Based on discussions with Registrant's staff, accounts are re-balanced and reviewed on a quarterly basis. Registrant should update this disclosure to accurately reflect its account management practices. Registrant also failed to disclose the number of reviewers, their titles and functions, instructions they receive from Registrant on performing reviews and the number of accounts assigned to each reviewer.

Item 12 Registrant indicates that it does not have the authority to determine, without specific client consent the securities to be bought or sold, the amount of the securities to be bought or sold, the broker or dealer to be used and the commission rates paid. Registrant does have the authority to determine the above items and should change the responses to indicate this authority.

Item 14 Registrant must include an audited balance sheet on Schedule G because Registrant has custody of clients' funds or securities.

Schedule F

Item 1A Registrant's disclosure is vague and misleading. The disclosure states that the service provided develops rates of return and the risk level necessary to achieve an investor's personal goals. There is no evidence that Registrant develops rates of return or risk levels for clients. The disclosure also states that portfolio assets will be reallocated quarterly if there has been an adverse "imbalancing" of investment values because of market movement. This disclosure is vague and confusing. Registrant also states that various technical and fundamental aspects of the securities market will be analyzed in order to determine the strategic investment allocation of the client's capital. Based on the staff's review of the advisory representatives' research files and the client files, no one on Registrant's staff is analyzing technical and fundamental aspects of the securities market. Registrant's statement that this service is provided is false. The disclosure also states that Registrant will recommend changes and re-balancing in the portfolio in accordance with the client's goals, objectives and prevailing economic conditions. According to the advisory representatives, they talk with their wholesalers to determine what changes to make in clients' portfolios and the only investments recommended include load mutual funds, mutual funds with 12b-1 fees or variable annuities with commission structures. The fact that these are the only investments recommended by Registrant must be disclosed to clients. In addition, little supporting documentation is maintained to support Registrant's disclosure that client's goals and objectives are considered in investment decisions.

Item 1D Registrant should disclose the dual fees paid by clients on investments in mutual funds and/or variable annuities. In addition to the advisory fees paid to Registrant, mutual funds and variable annuities also pay management fees to an investment adviser.

Item 6 Registrant failed to describe on Schedule F the educational or business standards required of all employees involved in determining or giving investment advice to clients. The current response includes the information for you but not for the other advisory representatives employed by Registrant.

Item 8 Registrant states that "the client is under no obligation to purchase products we recommend, or to purchase products with (sic) either through us or through Royal Alliance Assoc., Inc." According, to the advisory representatives, if clients do not accept their product recommendations, then the clients can manage their own assets. This disclosure is misleading as Registrant will not manage the assets unless the client accepts the products recommended by the advisory representative.

Item 9 Registrant's response on Schedule F fails to list the restrictions and internal procedures or disclosures for conflicts of interest inherent in these transactions.

Item 12 Registrant's response fails to list the factors considered, the reasonableness of the commissions and if the value of products, research and other services are a factor.

Rule 204-3(a) under the Advisers Act requires an investment adviser to furnish to each advisory client and prospective client a written disclosure statement, generally referred to as a brochure. This brochure may be either a copy of part II of Form ADV or another written document containing at least the information required by Part II of Form ADV. Registrant provides clients and prospective clients with Form ADV Part II as its written disclosure document. Registrant is not in compliance with Rule 204-3(a) because its Form ADV Part II does not contain all of the information required, as described above.[6]

Rule 204-3(b) requires an investment adviser to deliver its disclosure statement to an advisory client or prospective advisory client not less than 48 hours prior to entering into any written or oral investment advisory contract with the client. The disclosure statement may be provided at the time of entering into any contract if the advisory client has a right to terminate the contract without penalty within five business days after entering into the contract. Registrant's contract includes a clause indicating the client's receipt of the written disclosure statement. However, there is no evidence that the written disclosure statement was received 48 hours prior to entering into the agreement, and there is no provision in the contract granting the advisory client a right to terminate the contract without penalty within five business days.

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[6] Registrant's Form ADV, Part II is dated 1994; this indicates that Part II has not been updated since 1994.

Internal Controls

During the examination, the staff reviewed Registrant's control environment and procedures. Registrant does not maintain a written insider trading policy or internal control policies and procedures applicable specifically to its advisory business. Registrant does maintain a 1999 sales practice manual, which was provided by Royal Alliance Associates, Inc. ("Royal Alliance"). However, on the front of the manual it states that it is for broker-dealer use only. Most of the material in the manual is applicable to broker-dealers. However, there is one section in the manual that discusses some of the requirements of the Advisers Act. Nonetheless, the manual does not adequately address internal control policies and procedures applicable to Registrant's advisory business.

Section 14 of the Royal Alliance sales practices manual offers general advice and guidance on the Advisors Act. Much of the information is geared towards advisers working under Royal Alliance's investment advisory registration, rather than an independent adviser like Registrant. The manual lists particular requirements for Royal Alliance advisers, many of which are applicable to Registrant. Yet, in many instances, Registrant does not comply with these requirements. For example, on pages 14.12 – 14.13 under "Recordkeeping" the manual states that each advisory file must contain an individual investment policy statement, a copy of the financial plan, the recommendations, an asset allocation model given to clients and evidence on the adviser's periodic review. Registrant rarely maintains any of these documents, and there is no evidence of a periodic review. Of thirty client files reviewed, there was no documentation indicating that advisory representatives considered suitability in investment recommendations on collected information from clients on a continuing basis to implement changes in clients' portfolios. Registrant does generate quarterly reports, which are maintained in the client files; however, there is no indication that the advisers are reviewing the portfolios.

Also, employees do no appear to be knowledgeable about the Advisors Act. Mr. Smith stated that his knowledge was limited to information he reviewed while taking the Series 7 and Series 63 examinations. Mr. Covington stated that his regulatory knowledge was limited to information provided in continuing education classes required for registered representatives. Additionally, the staff's review of books and records disclosed that some records are not maintained or in some instances the records maintained did not contain the required information. Registrant must ensure that its books and records are maintained accurately and that all required records are retained.

In addition, Registrant included inconsistent information in some of its advertisements. In two different advertisements, Registrant indicates differing years of experience. On July 29, 1999, Registrant indicates in the Rome High School Sports Poster "Our Investment Professionals Have Over 77 Years of Combined Financial Experience." On August 27, 1999, Registrant states in an advertisement in the Historic Rome Business Association Brochure that Registrant has over 82 years of combined experience. Based on this information, Registrant's years of experience increased by five years in only one month.

Mr. Smith provided two worksheets as supporting documentation for the number-of-years calculation. The first worksheet indicates 83 years and the second worksheet indicates 81 years. Neither total from either of the worksheets matched the advertised financial experience. Registrant should ensure that information presented in advertisements is accurate and that documentation is maintained to support any calculation advertised.

Registrant should also develop policies and procedures for compliance with the Advisers Act. All employees should be apprised of these policies and procedures. Registrant's internal control structure should be strengthened to provide reasonable assurance that all managers and employees are following the established policies and procedures.

We are bringing the deficiencies and/or violations of law described above to your attention for immediate corrective action, without regard to any other action(s) that may result from the examination. You should not assume that Registrant's activities not discussed in this letter are in full compliance with the federal securities laws or other applicable rules and regulations.

Please respond in writing within thirty days of the date of this letter describing the steps you have taken or intend to take with respect to each of these matters.

In addition, a copy of your reply, together with copies of any enclosures, should be sent to the following person:

Robert L. Stype
Office of Compliance Inspections
and Examinations
(Mail Stop 9-1)
U.S. Securities and Exchange Commission
450 Fifth St., NW
Washington, DC 20549-0901

Sincerely,

Francis P. McGing
Assistant District Administrator

By: /s/ Diane S. Eckert, Chief
Branch of Investment
Company and Investment
Adviser Examinations

CERTIFICATE OF SERVICE

This shall certify that I have served a copy of Plaintiffs' *Brief in Support of Motion for Class Certification* by United States mail, first-class postage prepaid, upon the following:

Theodore J. Sawicki, Esq.
John H. Goselin, II, Esq.
Alston & Bird, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

DATED: December 22, 2000.

DAWSON & HUDDLESTON

/s/ Jason L. Nohr
JASON L. NOHR
Georgia Bar No. 545435

Suite 10
328 Alexander Street
Marietta, Georgia 30060-2079
(770) 919-7554
FAX (770) 499-0502

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE OF GEORGIA *ex rel.* TAMI P. COLSTON, District Attorney for the Rome Judicial Circuit,)
Plaintiff,)
v.)
DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC., and WALL STREET CREATIONS, LTD.,)
Defendants.)

CIVIL ACTION
FILE NO. ______

VERIFICATION

The undersigned hereby verifies that the allegations contained in the foregoing Complaint are true and correct to the best of her knowledge, information, and belief.

This 29th day of January, 2001.

/s/ Tami P. Colston
TAMI P. COLSTON
District Attorney
Rome Judicial Circuit

Sworn to and subscribed
before me this 29th day of
January, 2001

/s/ Gay S. Wade
NOTARY PUBLIC

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE OF GEORGIA *ex rel.*)
TAMI P. COLSTON, District)
Attorney for the Rome Judicial)
Circuit,)
)
Plaintiff,) CIVIL ACTION
)
v.) FILE NO. ___
)
DAVID L. PIMPER, AMY F.)
PIMPER, D. L. PIMPER)
GROUP, INC., and WALL)
STREET CREATIONS, LTD.,)
)
Defendants.)

PLAINTIFF'S FIRST INTERROGATORIES TO DEFENDANT DAVID L. PIMPER

Plaintiff serves these interrogatories upon Defendant David L. Pimper (hereinafter "Defendant") and request that they be answered fully in writing and under oath within the time provided by the Georgia Rules of Civil Procedure. Each interrogatory is addressed to the knowledge and information of Defendant's attorneys, investigators, agents, employees, officers, and other representatives. When a question is directed to Defendant, it is also directed to the aforementioned persons.

These interrogatories shall be deemed continuing so as to require supplemental answers if the persons or entities to whom these interrogatories are addressed obtain further information between the time the initial answers are served and the time of trial. The supplemental responses shall be served promptly upon discovery or receipt of the new information.

DEFINITIONS AND INSTRUCTIONS

As used herein, the terms listed below mean the following:

1. The term "Defendant" shall refer to David L. Pimper and all references thereto shall be deemed to include his attorneys, or any agent, investigator or representative of his attorneys.

2. The term "Royal Alliance" shall refer to Royal Alliance Associates, Inc. and all such references shall be deemed to include all of its employees, affiliates, agents or representatives, including its attorneys, or any employee, agent, investigator or representative of its attorneys.

3. The term "D.L. Pimper Group" shall refer to the D.L. Pimper Group, Inc., and any of its predecessors (including Integrated Resources, Linsco Financial Resources, and First Affiliated Securities) and all such references shall be deemed to include all of its employees, affiliates, agents or representatives, including its attorneys, or any employee, agent, investigator or representative of its attorneys.

4. "Communications" shall include, but not be limited to, any oral or written statement, notes, or utterances of any nature made to or by defendant including, but not limited to, correspondence, notes, reports, conversations,

dialogues, discussions, interviews, consultations, agreements and other understandings.

5. "Complaints" shall include, but not be limited to, all customer complaints (written and oral), lawsuits, arbitration claims, administrative proceedings, or investigations or inquiries (formal or informal) by any governmental, quasi-governmental or self-regulatory organization, including without limitation, the SEC, NASD, NYSE, AMEX, CBOE, or state regulatory authority.

6. "Documents" shall include, without limitation, each and every written, typed, printed, recorded or graphic matter, however produced or reproduced, of any type or description, regardless of origin or location, including all correspondence, records, tables, charts, emails, analyses, graphs, schedules, reports, memoranda, notes, lists, calendar, and diary entries, letters (sent or received), telegrams, telexes, messages (including, but not limited to reports of telephone conversations and conferences), studies, books, periodicals, manuals, booklets, work papers, guidelines, circulars, bulletins, instructions, files, minutes, other communications (including, but limited to, inter and intra office communications), questionnaires, contracts, or agreements, assignments, computer generated materials, tape recordings, wire recordings, other mechanical recordings or their electronic equivalents, transcripts or logs of any such recordings, all other data compilations from which information can be obtained, or translated, if necessary, and any other tangible things of a similar nature.

7. The conjunctions "and" and "or" shall be interpreted in every instance as meaning "and/or" and shall in neither instance be interpreted disjunctively to exclude any document or information otherwise within the scope of any description or request made herein.

8. Each request to identify or produce a document or documents shall be deemed to call for the identification or production of the original documents, to the extent that they are in or subject to, directly or indirectly, the control of the party to whom these requests are addressed. In addition, each request should be considered as including a request for separate identification or production of all copies and, to the extent applicable, preliminary drafts of documents that differ in any respect from the original or final draft or from each other (e.g., by reason of differences in form or content or by reason of handwritten notes or comments having been added to one copy of a document but not on the original or other copies thereof).

9. (a) "Identify" with respect to any "person" or any reference to stating the identity of any "person" means to state the name, employer address, employer phone number, home address, home phone number, of each such person, and a description of each such person's connection with the case and the facts underlying the case.

(b) "Identify" with respect to any "document" or any reference to stating the identification of any "document" means to prove the title and date of each such document, the name and address of the party or parties responsible for the preparation of each such document, the name and address of the party who requested or required the preparation of the document or on whose behalf it was prepared, the name and address of the recipient or recipients of each such document, and the names and addresses of any and all persons who have custody or control of each original and copy of the document.

10. As to any information withheld because of a claim of privilege or work product, state:

(a) the specific reason for withholding it;

(b) the source of the information, including his or her title, employer and address;

(c) the date the information was generated; and

(d) the general subject matter.

11. This request is continuing so as to require supplemental responses in the event that defendant obtains additional information called for by the following interrogatories between the time of the original response and the time set for hearing.

INTERROGATORIES

In accordance with the instructions and definitions set forth above, please respond fully to the following interrogatories:

1. Identify all D.L. Pimper Group accounts that were charged an asset allocation fee, giving the name, address, and telephone number of the owner of the account, and the account number.

2. Identify each and every bank, investment, or brokerage account you own, either individually or jointly, including the name and address of the financial institution where such accounts are located, the account balances of each account, the date each account was opened, and the account number for each account.

3. Identify each and every parcel of real property you own or lease either in whole or in part.

4. Identify any and all policies of insurance in which you are a named insured including the name of the insurer, the policy number and the limits of each policy.

5. Identify any motorized vehicle you own or lease, including the vehicle, the manufacturer, the model year, the vehicle identification number, and license number.

6. Identify any recreational vehicle you own or lease, including but not limited to boats, jet skis, airplanes, off-road vehicles, including a description of said vehicle and the year it was made.

7. Identify each and every travel agent or other individual or entity you have utilized in ordering any travel related services (including airline tickets, rental cars, hotel rooms), including the name, address and phone number of the individual or entity.

8. Identify each and every accountant you have employed or who has assisted you with respect to your personal and/or business finances since January 1, 1992, including the name, address, and phone number.

9. Identify each and every credit card account in your name, either individually or jointly, including the name of the account holder, the financial institution with

whom the account is listed, the account name, the limit of said account, and the account balance.

10. Identify each and every individual you employed personally or who was an employee of the D.L. Pimper Group since January 1, 1992.

11. Identify all computer programs utilized in connection with performing the asset allocation for which defendants charged plaintiffs and other clients, listing the maker of the program and the version(s) used.

12. Identify any videos relating to the asset allocation program for which defendants charged plaintiffs and other clients.

13. Identify any videos that were ever shown to agents, employees, or representatives of D.L. Pimper Group.

14. State the amount of the draw or salary from the D.L. Pimper Group you earned for each year since 1992.

15. Identify each and every shareholder of the D.L. Pimper Group, including the name, address, and phone number of each shareholder and the amount of each shareholder's interest.

16. Identify each and every shareholder of Wall Street Creations Ltd., including the name, address, and phone number of each shareholder and the amount of each shareholder's interest.

17. Describe how all commissions and fees were distributed between you, D.L. Pimper Group, and Royal Alliance in any asset allocation fee or investment adviser program offered by D.L. Pimper Group, including any

other individual entity who received any share of commissions or fees generated from such programs.

18. With respect to the preceding question, set forth the total amount of commissions or fees you received for each year since 1992, stating the specific amounts received by year.

19. Identify and describe each and every fine, sanction, or other disciplinary measure imposed upon you or D.L. Pimper Group by the NASD, the New York Stock Exchange, the SEC or any other governmental or regulatory agency including whether you have been or are currently being investigated by any regulatory agency.

20. Identify and describe any communication between you and any agent, employee or representative of Royal Alliance or the D.L. Pimper Group involving plaintiffs' accounts, including the date and nature of each communication, the identity of each party to that communication, whether the communication was in person or by telephone, and what was said by each party to that communication.

Respectfully submitted, this 29th day of January, 2001.

/s/ Tami P. Colston
TAMI P. COLSTON
Georgia Bar No. 179315
District Attorney

Office of the District Attorney
Rome Judicial Circuit
3 Government Plaza, Suite 302
Rome, Georgia 30161
(706) 291-5210

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, *ex rel.* TAMI P. COLSTON, District Attorney for the Rome Judicial Circuit, Plaintiff, v. DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, INC., and WALL STREET CREATIONS, LTD., Defendants.	)	CIVIL ACTION FILE NO. __

NOTICE OF TAKING DEPOSITION

TO: **David L. Pimper**
488 Sproull Road, S.E.
Rome, Georgia 30161

PLEASE TAKE NOTICE that commencing at 10:00 o'clock a.m. on the 2nd day of February, 2001, the Receiver will take the deposition upon oral examination of **David L. Pimper** pursuant to Sections 26 and 30 of the Georgia Civil Practice Act, O.C.G.A. §§ 9-11-26, 9-11-30 and 9-11-32(a)(3). The deposition will be held before a person duly authorized by law to administer oaths and take depositions at the Jury Assembly Room, 3rd Floor, Floyd County Courthouse, Rome, Georgia 30161.

The deposition will be taken for the purpose of preservation of evidence, use at trial, discovery and for any other purpose authorized by the Georgia Civil Practice Act before an authorized court reporter. The deposition will continue until complete.

This 29th day of January, 2001.

/s/ Andrew J. Ekonomou
ANDREW J. EKONOMOU
Georgia Bar No. 242750
Receiver

EKONOMOU ATKINSON & LAMBROS
450 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
Telephone (404) 221-1000
Telefax (404) 577-3900

IN THE SUPERIOR COURT FOR THE COUNTY OF FLOYD STATE OF GEORGIA

STATE OF GEORGIA, ex
rel. TAMI P. COLSTON,
District Attorney For the
Rome Judicial Circuit,

Plaintiff,

v.

DAVID L. PIMPER, AMY
F. PIMPER, D. L. PIMPER
GROUP, INC., and WALL
STREET CREATIONS, LTD.,

Defendants.

CIVIL ACTION

FILE NO. 01-CV-21058-3

DEFENDANTS' MOTION TO DISSOLVE ORDER APPOINTING RECEIVER AND GRANTING TEMPORARY RESTRAINING ORDER

Defendants David L. Pimper, Amy F. Pimper, D. L. Pimper Group, Inc. and Wall Street Creations, Ltd., hereby move to dissolve the Order Appointing Receiver and Granting Temporary Restraining Order, filed January 29, 2001, (and as modified by the Order filed January 30, 2001) (hereafter the "Order"). In support of this Motion, Defendants show as follows:

1. This action was commenced by the filing of a civil *in personam* Complaint by Plaintiff in the Superior Court of Floyd County, Georgia, on January 29, 2001.

2. In conjunction with the filing of the Complaint, Plaintiff obtained *ex parte* the Order Appointing Receiver and Granting Temporary Restraining Order, a copy of which is attached hereto as Exhibit A.

3. The Order was modified by the Order filed January 30, 2001 in the Superior Court of Floyd County, Georgia (a copy of which is attached hereto as Exhibit B).

4. Defendants hereby move to dissolve the Order on the grounds that:

(a) The Order is void and the Superior Court was without jurisdiction to enter it;

(b) The Order was improvidently granted without sufficient competent evidence to meet the requirements for the entry of a temporary restraining order and an order appointing a receiver; and

(c) The Order is overreaching, overbroad, illegal, and violative of Defendants' constitutional rights and their legal rights.

5. For the reasons set forth herein, and in the accompanying Memorandum of Law in Support of Defendants' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order, Defendants respectfully move for an order:

(a) voiding and dissolving the Order;

(b) immediately removing the Receiver, Andrew J. Ekonomou, and immediately divesting the Receiver of any authority or responsibility over any of the Defendants' assets, real and personal property, documents, and all things seized and/or affected by the Order;

(c) ordering Receiver to immediately provide Defendants with all keys, combinations to locks, passwords, identification numbers, and entry codes required to open or gain access to any property, computer files, safety deposit boxes, and all money or other assets deposited in or held by any financial institution to the credit of any of the Defendants wherever situated, and to immediately provide Defendants with all passwords or codes required to access any hardware, software or electronic files on any media relating to any of the Defendants;

(d) pursuant to O.C.G.A. § 16-14-15(a), terminating and extinguishing all purported RICO liens filed in connection with this action;

(e) returning Defendants to *status quo ante, i.e.,* before this Action was commenced in the Superior Court of Fulton County, Georgia on Monday, January 29, 2001;

(f) ordering that Plaintiff be responsible for any fees and expenses incurred by the Receiver to date, and not Defendants as per the Order; and

(g) granting Defendants such other and further relief as the Court deems just and proper.

Respectfully submitted this 5th day of February, 2001.

/s/ John H. Goselin II
Robert M. Brinson
Georgia Bar No. 082900
Mark M.J. Webb
Georgia Bar No. 744639

BRINSON, ASKEW,
BERRY, SEIGLER,
RICHARDSON & DAVIS LLP
615 West First Street
Rome, Georgia 30162-5513

Theodore A Sawicki
Georgia Bar No. 627851
John H. Goselin II
Georgia Bar No. 302917

ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

Attorneys for Defendants

CERTIFICATE OF SERVICE

This is [sic] certify that I have this day served a true and correct copy of Defendants' Motion to Dissolve Temporary Restraining Order upon all counsel of record by facsimile and by hand, and properly addressed as follows:

Tami P. Colston, District Attorney
Rome Judicial Circuit
Three Government Plaza, Suite 302
Rome, Georgia 30161

Andrew J. Ekonomou
Michael G. Lambros
Ekonomou, Atkinson & Lambros
450 The Hurt Building
Atlanta, Georgia 30303

This 5th day of February, 2001.

/s/ John H. Goselin II
Attorney for Defendants

IN THE SUPERIOR COURT FOR
THE COUNTY OF FLOYD
STATE OF GEORGIA

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney For the Rome Judicial Circuit, Plaintiffs,	
vs.	CIVIL ACTION FILE NO.: 01-CV-21058-3
DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD., Defendants.	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE ORDER APPOINTING RECEIVER AND GRANTING TEMPORARY RESTRAINING ORDER

INTRODUCTION

The "Order Appointing Receiver and Granting Temporary Restraining Order" ("Order"), entered against these Defendants at 2:35 p.m. on January 29, 2001, is harsh and the aftermath, in a word, brutal. Although it recites no specific evidence, and makes no findings of fact or conclusions of law, it acknowledges that it was issued after an *ex parte* hearing and sets into motion at least two of the most powerful forces of the judiciary. It modifies existing statutes and rules and "freeze[s]" (Order at 9) the assets of not only an ongoing regulated business, which is the livelihood of the individual Defendants and several employees, but also the assets and personal funds of the Pimper family. The procedure followed by the State in this case violated the Georgia Rules of Professional Conduct and Uniform Superior Court Rules and was, under the Official Code of Georgia and the Georgia and United States constitutions, fatally defective.

ARGUMENT

No one would dispute that *ex parte* proceedings are the exception rather than the rule. The target of the action is not there to defend himself, and, therefore, a plaintiff must equip the court to accord the absent party just consideration. Because there is no finding in the Order, because there is nothing but the Complaint package in the file and because there is no transcript of the *ex parte* hearing, Defendants do not know what evidence was provided, or even what was represented, to the Court. Moreover, because the State's Motion for Appointment of Receiver and for Temporary Restraining Order ("Motion") is not accompanied by a brief containing citations of supporting authorities, in violation of Uniform Superior Court Rule 6.1, Defendants do not know what legal arguments may have been presented to the Court and whether or not Georgia legal authority directly adverse to the State's position was disclosed as required. *See* Georgia Rule of Professional Conduct 3.3(a)(3). In any event, even a facial review of the Complaint, Motion and record compels a finding that the proceedings were fatally defective and the entire resulting order is void.

Although it is difficult to decide where to begin demonstrating all the fatal deficiencies of the proceedings, it would seem logical to note the *very first* article, section and paragraph of the Constitution of the State of Georgia (Bill of Rights): "No person shall be deprived of life, liberty or property except by due process of law."

"The fundamental idea in 'due process of law' is that of 'notice' and 'hearing' " [cites omitted] *Blocker v. Blackburn*, 228 Ga. 285 (1971). In *Blocker*, the Georgia Supreme Court held Georgia's pre-judgment distress warrant law to be a violation of the Georgia and United States constitutions.

Of course, it is undisputed that none of the Defendants received any notice, much less a hearing, before the Order was entered *and executed*. Defendants are, of course, aware that in some circumstances, such swift action may be justified; however, where such action is sought, the law - in order to be constitutional - is demanding and must be strictly construed. The situation that must be demonstrated to the Court to justify such an order has been variously described as "extreme," "urgent," "extraordinary," an "emergency," "to prevent manifest wrong, imminently impending," "to prevent immediate and irreparable injury."

The pleadings themselves are, and, on information and belief, the *ex parte* hearing was, lacking in the constitutional and statutory requirements.

I. The *ex parte* proceedings violated Defendants' rights and cannot support the entry of the Order.

The Georgia and United States constitutions and statutes assure the protection of rights. Indeed, the procedure for a TRO could not be any "plainer." *Mar-Pak Michigan,* *Inc. v. Pointer,* 226 Ga. 189, 191, 173 S.E.2d 206, 209 (1970). The Georgia RICO Act itself requires "conformity with the principles that govern the granting of injunctive relief" O.C.G.A. §16-14-6(b).

Further demonstrating the importance of proper and *fair* procedures, other rules provide guidance and protection. Uniform Rule for the Superior Court ("Uniform Rule") 4.1 expressly provides: "Except as authorized by law or by rule, judges shall neither initiate nor consider *ex parte* communications by interested parties or their attorneys concerning a pending or impending proceeding." (italics added).

Most importantly, the Georgia Rules of Professional Conduct expressly Provide that:

In an *ex parte* proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.3 *Candor Toward the Tribunal,* (d) (italics added).

The comments to that rule are exceedingly instructive:

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a

substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Rule 3.5 *Impartiality and Decorum of the Tribunal,* expressly provides:

> A lawyer shall not, without regard to whether the lawyer represents a client in the matter:
>
> . . .
>
> (b) communicate *ex parte* with [a judge] except as permitted by law;

(italics added). The comments to that rule are also instructive:

> [3A] The Rule with respect to *ex parte* communications limits direct communications except as may be permitted by law. Thus court rules or case law must be referred to in order to determine whether certain *ex parte* communications are legitimate. *Ex parte* communications may be permitted by statutory authorization.[1]
>
> [5] If the lawyer knowingly instigates or causes another to instigate a communication proscribed by *Rule*

---

[1] *See also* [3B] "A lawyer who obtains a judge's signature on a decree in the absence of the opposing lawyer where certain aspects of the decree are still in dispute, may have violated *Rule 3.5: Impartiality and Decorum of the Tribunal* regardless of the lawyer's good intentions or good faith."

3.5: Impartiality and Decorum of the Tribunal, a violation may occur.

A. The Court was without jurisdiction to enter the TRO, and thus, the Order is void.

Under the Georgia Civil Practice Act, the procedure for obtaining, *ex parte,* a temporary restraining order ("TRO") is set out in O.C.G.A. § 9-11-65(b):

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney *only if*:
>
> (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
>
> (2) The applicant's attorney certifies to the court, in writing, the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required.

(emphasis added).

This provision is strictly construed because of the harshness of the remedy. *United Food & Commercial Workers Union v. Amberjack, Ltd.,* 253 Ga. 438, 321 S.E.2d 736 (1984); *see also* the seminal case of *D'Antignac v. The City Council of Augusta,* 31 Ga. 700 (1861). And, as was noted in *Mar-Pak,* "It is difficult to see how a plainer restriction upon the power and authority of the judge to act in such matters could have been expressed." 226 Ga. at 191-92.

This requirement is not a mere formality; these notice requirements are "mandatory and jurisdictional." *Amberjack, Ltd.*, 253 Ga. at 438. A TRO issued without compliance is "utterly void." *Mar-Pak,* 226 Ga. at 190.

In this case, the applicant's attorney *did not* certify to the court, in writing, the efforts, if any, which were made to give notice and the reasons supporting the State's claim that notice should not be required. This is a fatal defect, and the Court did not have jurisdiction to enter the Order. The Order is utterly void.

B. The *ex parte* appointment of a receiver was without evidentiary support and should be vacated.

At the *ex parte* hearing, the State sought, and obtained, the appointment of a receiver with almost plenary powers. On information and belief, the State provided no evidence of any emergency and, indeed, *failed* to inform the Court of very material facts to support an informed decision. The failure caused an unjust result.

On information and belief, at or before the *ex parte* hearing, the Court was not presented evidence that there had been pending since June, 2000, a case in the United States District Court addressing the very issues in this [sic] cases.[3] In addition, although there was presented evidence in the form of the SEC's letter of examination, it was not suggested to the Court that the Defendants were under ongoing regulatory scrutiny at least since January, 2000, and that no cease and desist order had been issued. There was no evidence that there suddenly were extraordinary circumstances justifying the Order. Surely, these facts were material and, surely, the Court would want to know them in order to make an informed decision. Rule 3.3(d).[4] Surely, if there was an emergency, the State would have complied with Uniform Superior Court Rule 6.7. It did not. Indeed, given the invalidity of the verification on the Complaint, *see infra* at 9, the Court was provided *no evidence at all.*

---

[3] Indeed Uniform Superior Court Rule 4.9 *requires* such advice to the Court. The sense of Rule 4.8 is also instructive.

Perhaps the best statement of why the appointment was wrong is contained in *Irwin v. Willis,* 202 Ga. 463 (1947):

> It cannot be denied that, as a general rule, creditors without a lien may not enjoin their debtors from disposing of property or obtain other extraordinary relief in equity, such as the appointment of a receiver. [O.C.G.A. §9-5-6]. [Citations omitted]. The Constitution of this State, article 1, section 1, paragraph 2, declares: "Protection to person and property is the paramount duty of government, and shall be impartial and complete." It is the duty of the State government, through the instrumentality of the courts, to protect the property of a citizen and his right to possess and control it. This duty is not performed when the court, through the agency of a receiver,

---

[4] Of course if Defendants had received notice, they could have brought all these facts, arguments, and authorities to the Court's attention.

deprives the citizen of the possession and control of his property where he has not forfeited such right under some provision of the law. In *Jones v. Wilson,* 195 Ga. 310 (24 S.E. 2d. 34), after stating that the appointment of a receiver determined no rights between the parties and did not affect title in any way and further stating that the purpose of a receivership was to preserve the property contested for until a final determination of the questions involved, it was said: "No matter how strong the apparent equity of the complainant may be, if there is no necessity for a receivership, the courts will not change the status until final decree." In the early case of *Crawford v. Ross,* 39 Ga. 44, this court emphasized the seriousness of interference with the right of the citizen in the appointment of a receiver, and stated that such equitable relief ought to be granted only to prevent manifest wrong. It was further said: "The high prerogative act of taking property out of the hands of one, and putting it in pound, under the order of a judge, ought not to be taken, except to prevent manifest wrong, imminently impending." This language was repeated by this court in *Dozier v. Logan,* 101 Ga. 173 (28 S. E. 612), with the comment that, "If it were possible for the court, as at present constituted, to add anything to the emphasis of this language, it would do so without the slightest hesitation. The appointment of a receiver is recognized as one of the harshest remedies which the law provides for the enforcement of rights, and is allowable only in extreme cases, and under circumstances where the interest of creditors is exposed to manifest peril." All of this was quoted with approval in *Bainbridge Power Co. v. Ivey,* 173 Ga. 18 (159 S. E. 660). The legislature gave recognition to the seriousness of appointing a receiver and the need for caution when it adopted the Code, § 55-303, where it is said, "The power of appointing receivers should be prudently and cautiously exercised, and except in clear and urgent cases should not be resorted to."

* * *

It can not be contended that, where there exists an adequate remedy at law, a trial court can ever be justified in appointing a receiver. . . . A lien alone, where there is no evidence that the property under such lien is in danger of loss, destruction, or injury, constitutes no reason whatever for the appointment of a receiver for such property. *Id.* at 477-78.

II. The State failed to execute a proper bond a condition precedent to Count 1 of the Complaint.

The RICO Complaint alleges that Plaintiff is bringing suit under O.C.G.A. § 16-14-7(m) governing "forfeiture proceedings," and §16-14-9. The Complaint misspeaks, because it, of course, also seeks the injunctive relief provided by O.C.G.A. § 16-14-6. *See* ¶¶ 5, 31, 32; prayer, sub ¶¶ (a), (i)-(vi). *See* e.g. Order, p. 14, Section XIII. An integral part of that Code Section is O.C.G.A. § 16-14-6(b), which provides:

Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued.

Understandably, the harshness of the RICO law requires that, as a condition precedent to the remedy, a proper bond be executed. To Defendants' knowledge, no such bond has been executed. For this reason alone, the Order granting O.C.G.A. § 16-14-6 remedies is void.

III. The Complaint contains no positive verification.

The Complaint does not contain either of the essential requirements for a positive verification, which is necessary under O.C.G.A. § 9-11-65(b).

First, the record does not reflect any specific facts either in any affidavit filed along with Plaintiff's motion (indeed, no affidavits were filed) or in the Complaint showing that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard. The sole paragraph in the Complaint addressing this issue is ¶37, which states the bald conclusion: "Unless restrained and enjoined by the Court, the Defendants will conceal and dispose of such personal and real property, including money." This conclusory allegation does not contain specific facts and does not meet the requirements of O.C.G.A. §9-11-65(b).

Second, the purported perfunctory "information and belief" verification by the District Attorney is patently insufficient to provide the required evidentiary basis for the extraordinary relief requested. In *Wright v. Wheatley*, 210 Ga. 35, 77 S.E.2d 435 (1953), the court held:

> Where, as in this case, the petition for injunction, receiver and other equitable relief contains many allegations upon "information and belief," and is not plausibly verified by any of the petitioners, but the attorney for the petitioner's mistakes are verified by an affidavit that "you . . . do solemnly swear . . . that the facts alleged in said petition are true, according to your investigation, knowledge, information and belief," but fails to disclose which of the essential facts of the petition and which were not within his knowledge, and which of the allegations are based only upon his information, or belief, or investigation, such affidavit fails to verify plausibly the essential facts alleged in that petition . . . The Georgia Supreme Court affirmed the dismissal of the petition.

Id. at 36, 77 S.E.2d at 436.

Because the essential requirements for a positive verification have not been met in the Complaint, it is deficient and the Court was without jurisdiction to enter the Order and the Order is void.

IV. The Order is unconstitutional and overbroad because it purports to deny Defendants the right to voluntarily file bankruptcy.

The Order purports to give the Receiver the right to "file for relief and protection under the Federal Bankruptcy Code, on behalf of any or all of the Defendants or any entity controlled by any of the Defendants." (*See* Order, subsection I. of Section I). The Order also prevents

Defendants from interfering with the "exclusive jurisdiction of this Court over the receivership estate." (*See* Order, subsection C.3. of Section VII).

These aspects of the Order are illegal and overbroad under Georgia law and constitutional principles. Both the Pimpers and the Pimpers on behalf of their corporations have the right to independently seek relief under the Federal Bankruptcy Laws. The constitutional principles of supremacy protect these rights. *In re Greater Atlanta Apartment Hunter's Guide, Inc.*, 40 B.R. 29, 31 (Bankr. N.D. Ga. 1984) (J. Norton) (citation omitted). In *Greater Atlanta* the court ruled that a "state court receivership cannot operate to deny a corporate debtor access to this nation's federal Bankruptcy Courts." *Id.* This is because "[t]he United States Constitution Art. 1, s 8 and the Supremacy Clause of the Constitution, U.S. Constitution Art. 6, Cl. 2, dictate the bankruptcy proceedings supersede pending state proceedings." *Jordan v. Independent Energy Corp.*, 446 F. Supp 516, 525 n. 14 (N.D. Tex. 1978) (citing *Taylor v. Steinberg*, 293 U.S. 470, 55 S.Ct. 260, 79 L.Ed. 599 (1935); *In re Beaver Cotton Mills*, 275 F. 498 (N.D.Ga.1921)).

Moreover, it has been stated that the "exclusivity of a receiver's title to all assets of the debtor under state law is irrelevant to the determination whether that debtor may file for bankruptcy relief." *In re Jones*, 97 B.R. 901, 902 (Bankr. S.D. Oh. 1989) (citing *Cash Currency Exchange, Inc. v. Shine (In re Cash Currency Exchange, Inc.)*, 762 F.2d 542, 553 (7th Cir. 1985). Based on these sound constitutional principles, the ability for the Pimpers, as individuals, and the Pimpers, as directors of their corporations, to file for bankruptcy cannot be impeded by the Receiver's powers. Therefore, the Order is overbroad and unconstitutional.

V. The Receiver, as an officer of the Court, is required to use ordinary care to preserve the assets of the receivership estate.

The Order purports to absolve the receiver and his employees or agents from liability, except in the case of bad faith and recklessness. (*See* Order, p. 6, Section V). The extreme breadth of the Receiver's authority to act with indifference to ordinary care oversteps the Receiver's duty as an officer of the court.

As an officer of the court, a receiver is a fiduciary and held to a high standard of care. *See Northeast Factor & Discount Co. v. Mortgage Invs., Inc.,* 107 Ga. App. 705, 131 S.E. 2d 221 (1963). Under Georgia law, a receiver may be liable in his official capacity for sheer negligence or lack of ordinary care to maintain property with which he was charged to maintain. *See Becknell v. McConnell,* 142 Ga. App. 567, 568, 236 S.E.2d 546, 548 (Ga. Ct. App. 1977). Moreover, the Receiver and his agents also may be personally liable for negligent acts outside the scope of the receivership. *Id.*

Because the Receiver is an officer of the court and fiduciary, he has an obligation to maintain and preserve the receivership assets with ordinary care. The Order as it is written is overbroad and unconstitutional.

VI. The purported freeze of all Defendants' after-acquired property violates Defendants' constitutional rights.

The Civil RICO Act subjects all property acquired by means of the alleged racketeering activity to forfeiture proceedings. O.C.G.A. § 16-14-7. This Order improperly reaches beyond the statutory authority and purports to freeze all property of the Defendants, including all after-acquired property from any source, even without regard to any alleged connection to the alleged wrongdoing. The Georgia RICO Act does not authorize the seizure of money and property that is not related to the alleged racketeering activities. O.C.G.A. § 16-14-7(a). Yet, under the Order, even money the Defendants could earn from another job to support their family would be subject to the receivership. (*See* Order, subsection D. of Section VIII).

This aspect of the Order violates the Defendants' constitutional rights. "Fundamental constitutional rights are those that are recognized as having a value so essential to individual liberty in our society that their infringement merits careful scrutiny by the courts." *Ambles v. State,* 259 Ga. 406, 408, 383 S.E.2d 555, 557-58 (1989). Even under forfeiture proceedings pursuant to RICO, Defendants still have a right to earn, use, hold and enjoy property that is not the subject of the racketeering activities. That is, "[t]he Constitutional right of property is the right to use and enjoy or dispose of property in lawful manner and for lawful purposes." *Barker v. State,* 56 Ga.App. 705 193 S.E. 605 (1937). Accordingly, the portion of the Order regarding the purported Asset Freeze is overbroad and unconstitutional.

VII. The Complaint and Motion are defective and should be dismissed and the Order vacated.

The Complaint and Motion seek equitable remedies, and both (1) fail even to allege that the State does not have an adequate remedy at law; (2) fail to allege that immediate and irreparable injury will occur if the harsh remedies are not granted; (3) fail to allege that the State has fulfilled the condition precedent of executing a proper bond, as required by O.C.G.A. §16-14-6(b); (4) fail to include a sworn certification by counsel pursuant to O.C.G.A. §9-11-65(b)(1) and (2); and (5) show that the remedies sought, and the scope thereof, are excessive and would operate oppressively against the Defendants. Moreover, the verification is not a direct and proper verification as required. See O.C.G.A. §9-10-110. The Complaint is so defective that it should be dismissed and the Order dissolved.

VIII. These provisions of the Georgia RICO Act are unconstitutional as applied.

If the Georgia RICO Act permits the proceeding to go forward as the State has brought them without the protections built into that Act, then the provisions of the Georgia RICO Act under which this case is brought are violative of the due process and equal protection clauses of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution on their face. If these provisions are constitutional on their face, they have been unconstitutionally applied in this case.

CONCLUSION

"In ex parte proceedings under special authority . . . strict compliance by the State with *all* the prerequisites of the statute *must* be shown." *State Highway Dept. v. Kirchmyer, et al.* 118 Ga.App. 652, 653, 165 S.E. 2d 170, 172 (1968) (emphasis added). The numerous deficiencies and errors referenced above are not merely harmless omissions or technicalities. They deny the essence of due process and the protection of individual liberty which are guaranteed by the Georgia and United States constitutions.

The Order issued at 2:35 p.m. on January 29, 2001, after an *ex parte* hearing, should be vacated.

Respectfully submitted this 5th day of February, 2001.

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ATTORNEYS FOR
DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the **Memorandum in Support of Defendants' Motion to Dissolve Order Appointing Receiver And Granting Temporary Restraining Order** upon all counsel of record via facsimile and hand delivery to:

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and by hand delivery, and properly addressed as follows:

Tami P. Colston, District Attorney
Rome Judicial Circuit
3 Government Plaza, Suite 302
Rome, GA 30161

This 5th day of February, 2001.

/s/ Mark M.J. Webb by JHG
with express permission
Mark M.J. Webb

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney For the Rome Judicial Circuit, Plaintiffs,	CIVIL ACTION FILE NO.: 4:01-CV-030-HLM
vs.	
DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD., Defendants.	

DEFENDANTS DAVID L. PIMPER'S and AMY F. PIMPER'S MOTION TO DISSOLVE ORDER APPOINTING RECEIVER AND GRANTING TEMPORARY RESTRAINING ORDER

Pursuant to Fed.R.Civ.P. 65(b), Defendants David L. Pimper and Amy F. Pimper ("Defendants") hereby move to dissolve the Order Appointing Receiver and Granting Temporary Restraining Order, entered January 29, 2001, (and as modified by the Order filed January 30, 2001) (hereafter the "Order") in the Superior Court of Floyd County, Georgia prior to the removal of this action. In support of this Motion, Defendants show as follows:

1. This action was commenced by the filing of a civil *in personam* Complaint by Plaintiff in the Superior Court of Floyd County, Georgia, on January 29, 2001.

2. In conjunction with the filing of the Complaint, Plaintiff obtained *ex parte* the Order Appointing Receiver and Granting Temporary Restraining Order.

3. The Order was modified by the Order filed January 30, 2001 in the Superior Court of Floyd County, Georgia.

4. On February 5, 2001, Defendants filed a motion to dissolve the order in the Superior Court of Floyd County.

5. On February 6, 2001, the Superior Court of Floyd County, after a brief hearing, denied *ore tenus* Defendants' motion to dissolve.

6. On February 7, 2001, Defendants removed this action under §§ 1331 and 1441(b).

7. Defendants hereby move to dissolve the Order on the grounds that:

(a) The Order is void and the Superior Court was without jurisdiction to enter it;

(b) The Order was improvidently granted without sufficient competent evidence to meet the requirements for the entry of a temporary restraining order and an order appointing a receiver; and

(c) The Order is overreaching, overbroad, illegal, and violative of Defendants' constitutional rights and their legal rights.

8. For the reasons set forth herein, and in the accompanying Memorandum of Law in Support of Defendants' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order, Defendants respectfully move for an order:

(a) voiding and dissolving the Order;

(b) immediately removing the Receiver, Andrew J. Ekonomou, and immediately divesting the Receiver of any authority or responsibility over any of the Defendants' assets, real and personal property, documents, and all things seized and/or affected by the Order;

(c) ordering Receiver to immediately provide Defendants with all keys, combinations to locks, passwords, identification numbers, and entry codes required to open or gain access to any property, computer files, safety deposit boxes, and all money or other assets deposited in or held by any financial institution to the credit of any of the Defendants wherever situated, and to immediately provide Defendants with all passwords or codes required to access any hardware, software or electronic files on any media relating to any of the Defendants;

(d) terminating and extinguishing all purported RICO liens filed in connection with this action;

(e) returning Defendants to *status quo ante, i.e.,* before this Action was commenced in the Superior court of Floyd County, Georgia on Monday, January 29, 2001;

(f) ordering that Plaintiff be responsible for any fees and expenses incurred by the Receiver to date, and not Defendants as per the Order; and

(g) granting Defendants such other and further relief as the Court deems just and proper.

Respectfully submitted this 7th day of February, 2001.

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ATTORNEYS FOR DEFENDANTS
DAVID L. PIMPER and
AMY F. PIMPER

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the **Defendants' David L. Pimper's**

and Amy F. Pimper's Motion to Dissolve Order Appointing Receiver And Granting Temporary Restraining Order upon all counsel of record by hand-delivery, addressed as follows:

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This 7th day of February, 2001.

/s/ Theodore J. Sawicki
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney For the Rome Judicial Circuit. Plaintiffs, vs. DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD., Defendants.	CIVIL ACTION FILE NO.: 4:01-CV-030-HLM

MEMORANDUM IN SUPPORT OF DEFENDANTS DAVID L. PIMPER'S and AMY F. PIMPER'S MOTION TO DISSOLVE ORDER APPOINTING RECEIVER AND GRANTING TEMPORARY RESTRAINING ORDER

> "We need not decide the thorny problem of whether, on the facts of this case, an injunction- . . . could be justified. The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued ex parte, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but

> there is no place within the area of basic freedoms guaranteed by the [Constitution] for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate."

Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968).

INTRODUCTION

On January 29, 2001, Plaintiff commenced a purported Georgia RICO Act ("RICO") civil forfeiture action against the Defendants in the Superior Court of Floyd County, Georgia. At 2:35 p.m. on Monday, January 29, 2001, the Superior Court of Floyd County, Georgia entered, *ex parte,* the "Order Appointing Receiver and Granting Temporary Restraining Order" ("Order"). Although aware that Defendants were represented by counsel in litigation pending before this Court, Plaintiff made no effort to provide notice of the motion. Indeed, the evidence (what little there is) demonstrates that Plaintiff has engaged in active communication with putative class counsel for the Plaintiffs in *Ball, et al. v. Royal Alliance, et al.,* Civil Action No. 1:00-CV-1509-MHS.

Under applicable provisions of Georgia law, the Order is void, illegal, and unconstitutional. In a word, the Order is brutal. Although it recites no specific evidence, and makes no findings of fact or conclusions of law, it acknowledges that it was issued after an *ex parte* hearing and sets into motion at least two of the most powerful forces of the judiciary. It purports to modify existing Georgia statutes, decisional law and rules and "freeze[s]"

(Order at 9) the assets of not only an ongoing regulated business, which is the livelihood of the individual Defendants and several employees, but also the assets and personal funds of the Pimper family. The Order violated the United States and Georgia constitutions, and Georgia law, and under clearly established law is "utterly void." *Mar-Pak Michigan, Inc. v. Pointer*, 226 Ga. 189, 173 S.E.2d 206 (1970).

No one would dispute that *ex parte* proceedings are the exception rather than the rule. The target of the action is not there to defend himself, and, therefore, a plaintiff must equip the court to accord the absent party just consideration. In this case, because there is no finding in the Order, because there is nothing but the Complaint package that has been docketed and because there is no transcript of the *ex parte* hearing, Defendants do not know what evidence was provided, or even what was represented, to the Court.

The *very first* article, section and paragraph of the Constitution of the State of Georgia (Bill of Rights) provides: "No person shall be deprived of life, liberty or property except by due process of law." "The fundamental idea in 'due process of law' is that of 'notice' and 'hearing' " *Carrol, supra; Blocker v. Blackburn*, 228 Ga. 285, 289, 185 S.E.2d 56, 59 (1971).

None of the Defendants received any notice, much less a hearing, before the Order was entered *and executed*. Defendants are, of course, aware that in some circumstances, such swift action may be justified; however, where such action is sought, the law – in order to be constitutional – is demanding and must be strictly construed. The situation that must be demonstrated to the Court to justify such an order has been variously described as "extreme," "urgent," "extraordinary," and "emergency," "to prevent manifest wrong, imminently impending," "to prevent immediate and irreparable injury."

The pleadings themselves and the *ex parte* hearing wholly fail to meet these fundamental constitutional and statutory requirements. This Court has the obligation and broad authority to determine whether the extraordinary injunctive relief ordered by the Superior Court of Floyd County was legal and appropriate. *Bryfogle v. Carrel Corp.*, 666 F.Supp. 730 (E.D. Pa. 1987); *Standard Forms Co. v. Nave*, 422 F.Supp. 619 (E.D. Tenn. 1976).

I. The Superior court was without jurisdiction to enter the TRO, and thus, the Order is void.

The procedure, under Georgia law for obtaining a temporary restraining order *ex parte* is clearly established. It could not be any "plainer." *Mar-Pak Michigan, Inc. v. Pointer*, 226 Ga. at 191, 173 S.E.2d at 209. The Georgia RICO Act itself requires "conformity with the principles that govern the granting of injunctive relief." O.C.G.A. §16-14-6(b).

This action was commenced as a civil *in personam* action against Defendants under the Georgia RICO Act provisions of O.C.G.A. §§ 16-14-6 and 16-14-7. Because this is an *in personam* action, the procedures for obtaining *ex parte* relief available under subsection (c) through (g) of § 16-14-7 of the Georgia RICO Act do no apply. Instead, O.C.G.A. § 16-16-7(b) expressly provides that: "A RICO forfeiture proceeding shall be governed by Chapter 11 of Title 9, the "Georgia Civil Practice Act. . . . " *See also* O.C.G.A. § 16-14-7(m); Complaint, preamble, p.1, ¶31 and 33.

Under the Georgia Civil Practice Act, the necessary procedure and jurisdictional prerequisite for obtaining, *ex parte*, a temporary restraining order ("TRO") is set out in O.C.G.A. § 9-11-65(b):

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney *only if*:
>
> (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
>
> (2) The applicant's attorney certifies to the court, in writing, the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required.

(emphasis added). Further, to obtain a temporary restraining order und [sic] the Georgia RICO Act, Plaintiff must show immediate danger of significant loss or damage. O.C.G.A. § 16-14-6(b) To appoint a receiver, Plaintiff must show by specific facts that Defendants have been and are concealing and disposing of assets. Rule 65(b), Fed.R.Civ.P., which governs temporary restraining orders in federal court, contains the identical requirements.

The provisions of Rule 65 are strictly construed because of the harshness of the remedy. *United Food & Commercial Workers Union v. Amberjack, Ltd.*, 253 Ga. 438, 321 S.E.2d 736, 737 (1984); *see also* the seminal case of *D'Antignac v. The City Council of Augusta*, 31 Ga. 700 (1861). And, as was noted in *Mar-pak*, "It is difficult to see how a plainer restriction upon the power and authority of the judge to act in such matters could have been expressed." 226 Ga. at 191-92.

These requirements are not mere formalities; these notice requirements are "mandatory and jurisdictional." *Amberjack, Ltd.*, 253 Ga. at 438. A TRO issued without compliance is "utterly void." *Mar-Pak*, 226 Ga. at 190.

(A.) There are no affidavits or valid verification of allegations to support the extraordinary relief sought and obtained.

First, the record does not reflect any specific facts either in any affidavit filed along with Plaintiff's motion (indeed, no affidavits were filed) or in the Complaint showing that immediate danger of significant loss or damage will result, or that Defendants have been and are concealing and disposing of assets, before the adverse party or his attorney can be heard. The sole paragraph in the Complaint addressing this issue is ¶ 37, which states the bald conclusion: "Unless restrained and enjoined by the Court, the Defendants will conceal and dispose of such personal and real property, including money." This conclusory allegation does not contain specific facts and does not meet the requirements of O.C.G.A. §9-11-65(b) or Fed. R. Civ. P. 65(b).

Second, the purported perfunctory "information and belief" verification by the District Attorney, *counsel* for Plaintiff, is patently insufficient to provide the required evidentiary basis for the extraordinary relief requested and obtained.

As counsel, the District Attorney does not have personal knowledge of the asserted evidentiary facts purporting to support the grant of the temporary restraining order. Her verification of the Complaint – the *sole* verification of the Complaint – admits as much. The District Attorney merely verified that the allegations on the Complaint are true and correct "to the best of her knowledge, information and belief."

Under Georgia law, such a conclusory "information and belief" verification is fatally deficient. In *Wright v. Wheatley*, 210 Ga. 35, 77 S.E.2d 435 (1953), the court held:

> [W]here, as in this case, the petition for injunction, receiver and other equitable relief contains many allegations upon "information and belief," and is not positively verified by any of the petitioners, but the attorney for the petitioner's undertakes to verify it by an affidavit that "you . . . do swear . . . that the facts alleged in said petition are true, according to your investigation, knowledge, information and belief," but fails to disclose which of the essential facts of the petition and which were not within his knowledge, and which of the allegations are based only upon his information, or belief, or investigation, such affidavit fails to verify positively the essential facts alleged in that petition . . .

Id. at 36, 77 S.E.2d at 436. The Georgia Supreme Court affirmed the dismissal of the petition.

The federal law governing verification supporting requests for temporary and interlocutory injunctive relief leads to the same conclusion. In a recent decision denying a motion for temporary restraining order and preliminary injunction arising out of the 2000 Presidential election, the U.S. District Court for the Southern District of Florida noted that under federal law: "[w]hen the primary evidence introduced is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for preliminary injunction." *Touchston v. McDermott,* 120 F.Supp.2d 1055, 1059 (S.D.Fla. 2000) (citing 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2949 (2d ed. 1995)). In light of this insufficient verification, the court held that the plaintiffs failed to demonstrate that they will suffer irreparable injury under an injunction issues. *Touchston,* 120 F.Supp.2d at 1060.

This is a long-standing principle. In *Marshall Dublin Farms v. National Farmers Organization, Inc.,* the Fifth Circuit reversed an order granting a preliminary injunction on the grounds (among others) that the movant's extensive use of "information and belief" verification of alleged facts was insufficient to support the extraordinary relief requested. 446 F.2d 353, 357 (5th Cir. 1971).

Because the essential requirements for competent testimony or positive verification to support the alleged facts and request for extraordinary *ex parte* injunctive relief have not been met, the Superior Court was without jurisdiction to enter the Order and the Order is void.

B. There was and is not certification in writing as to why notice was not given or required.

Plaintiff's attorney not only *did not* certify to the court, in writing, the efforts, if any, which were made to give notice and the reasons supporting the Plaintiff's claim that notice should not be required, but also admitted this failure was intentional. Transcript of proceedings, January 30, 2001 at 17. This is a fatal defect, and the Superior Court did not have jurisdiction to enter the Order. The Order is "utterly void." *Mar-Pak,* 226 Ga. at 190; *accord Heyman v. Kline,* 456 F.2d 123, 127 n.2 (2d Cir. 1972), *cert. denied,* 409 U.S. 847 (1972).

C. The *ex parte* appointment of a receiver was without evidentiary support and should be vacated.

At the *ex parte* hearing, Plaintiff sought, and obtained, the appointment of a receiver with almost plenary powers. There is no evidence in the record that Plaintiff provided evidence of any emergency and, indeed, *failed* to inform the Court of very material facts to support an informed decision.

There are no affidavits in the record and there was no transcript of the *ex parte* hearing. Although Plaintiff claims there was oral testimony presented at the *ex parte* hearing, the failure to have that purported testimony transcribed nullifies any evidentiary value that such oral testimony (if in fact provided) may have had. *Arnau v. Arnau,* 2307 Ga.App. 696, 697, 429 S.E.2d 116, 117 (1993); *McCarley v. Sanders,* 309 F.Supp. 8, 11 (M.D.Ala. 1970).

Before the *ex parte* hearing, the Court was not presented any pleadings from the *Ball v. Royal Alliance* case in the United States District Court addressing the very issues in this case.[2] In addition, although there was presented purported evidence in the form of the SEC's unauthenticated, hearsay letter of examination, it was not suggested to the Court that the Defendants were under ongoing regulatory scrutiny at least since January, 2000, and that no cease and desist order had been issued. There was no evidence that there suddenly were extraordinary circumstances justifying the Order. Surely, these facts were material and, surely, the Court would want to know them in order to make an informed decision. Georgia Rule of Professional Conduct 3.3(d).[1]

Given the invalidity of the verification on the Complaint, *see infra*, at 9, the Superior Court was provided *no evidence at all*.

II. The State failed to execute a proper bond, a condition precedent to Count 1 of the Complaint.

The Complaint alleges that Plaintiff is bringing suit under O.C.G.A. § 16-14-7(m) governing "forfeiture proceedings," and §16-14-9. Yet, the Complaint also expressly seeks the injunctive relief provided by O.C.G.A.

---

[2] Indeed, Georgia Uniform Superior Court Rule 4.9 *requires* such advice to the Court. The sense of Rule 4.8 is also instructive.

[1] Of course, if Defendants had received notice, they could have brought all these facts, arguments, and authorities to the Court's attention.

§ 16-14-6. *See* ¶¶ 5, 31, 32; prayer, sub ¶¶ (a), (i)-(vi). *See* e.g. Order, p. 14, Section XIII.

An integral part of Georgia RICO statutory scheme regarding interlocutory relief is the posting of a proper bond. Specifically, the execution of a proper bond is a condition precedent to interlocutory relief under O.C.G.A. § 16-14-6. Section 16-14-6(b), O.C.G.A. provides:

> Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued.

Understandably, the harshness of the RICO law requires that, as a condition precedent to the remedy, a proper bond against an injunction improvidently granted be executed.[4] No such bond was executed. For this reason alone, the Order granting O.C.G.A. § 16-14-6 remedies is void.

III. The Georgia RICO Act is and the actions of the Plaintiff thereunder are unconstitutional as applied in this case.

Plaintiff's position as to its purported powers under the Georgia RICO Act (RICO) is unclear at best. It appears that Plaintiff asserts that (1) RICO permits some sort of exception to Georgia and and [sic] United States jurisprudence governing the equitable powers of the superior courts, or (2) the provisions of RICO do not mean what they say, or (3) that Plaintiff has made some sort of showing that extraordinary circumstances exist so that Georgia statutes and the United States and Georgia Constitutions are suspended.

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[4] The aftermath of the Order, i.e., the devastating and ruinous effect of the unlawful seizure and plenary asset freeze, and the attendant publicity, on Mr. and Mrs. Pimper's reputation and livelihood, speaks loudly why such a requirement is a condition precedent to the procedure.

Accordingly, Defendants assert the following constitutional defenses and assertions:

The provisions of the Georgia RICO Act, or the application thereof in this case, contravene the Due Process and Equal Protection Clauses of the United States Constitution and the Georgia Constitution, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution on each of the following grounds:

(a) The Order and the pertinent Georgia law and procedures as applied in this case purports to allow proof of crimes upon satisfaction of a standard of proof less than the applicable standard of proof required for the imposition of criminal sanctions;

(b) The Order and the pertinent Georgia law and procedures as applied in this case fail to provide a reasonable limit on violations of Defendants' and innocent third parties' rights;

(c) The Order and the pertinent Georgia law and procedures as applied in this case fail to provide specific standards for the execution of such remedies;

(d) The Order and the pertinent Georgia law and procedures as applied in this case are unconstitutionally vague;

(e) The Order and the pertinent Georgia law and procedures as applied in this case fail to provide specific standards for the degree of remedial measures;

(f) The Order and the pertinent Georgia law and procedures as applied in this case fail to provide a clear appellate standard of review of the State action as it affects Defendants and third parties;

(g) The Order and the pertinent Georgia law and procedures as applied in this case allow an arbitrary and capricious taking of property without due process of law;

(h) The Order and the pertinent provisions of the Georgia RICO Act and the Georgia Civil Practice Act as applied in this case prevent Defendants from exercising their constitutional right to confront the witnesses against them;

(i) The Order and the pertinent Georgia law and procedures as applied in this case prevent Defendants from exercising their constitutional rights to the counsel of their choice;

(j) The Order and the pertinent Georgia law and procedures as applied in this case constitute an unreasonable search and seizure;

(k) The Order and the pertinent Georgia law and procedures as applied in this case violate Defendants' constitutional privilege against self-incrimination;

(l) The Order and the pertinent Georgia law and procedures as applied in this case violated Defendants' procedural due process rights;

(m) The Order and the pertinent Georgia law and procedures as applied in this case result in the imposition of different penalties for the same or similar acts and, thus, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and of the Georgia Constitution;

(n) The Order and the pertinent Georgia law and procedures as applied in this case permit the imposition of penalties for the same or similar conduct, which thereby infringes upon the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution; and

(o) The Order and the pertinent Georgia law and procedures as applied in this case may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing, which violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

IV. The Order is unconstitutional and overbroad because it purports to deny Defendants the right to voluntarily file bankruptcy.

The Order purports to give the Receiver the right to "file for relief and protection under the Federal Bankruptcy Code, on behalf of any or all of the Defendants or any entity controlled by any of the Defendants." (*See* Order, subsection I, of Section I). The Order also prevents Defendants from interfering with the "exclusive jurisdiction of this Court over the receivership estate." (*See* Order, subsection C.3, of Section VII).

These aspects of the Order are illegal and overbroad under Georgia law and constitutional principles. Both the Pimpers, and the Pimpers on behalf of their corporations, have the right to independently seek relief under the Federal Bankruptcy Laws. The constitutional principles of supremacy protect these rights. *In re Greater Atlanta Apartment Hunter's Guide, Inc.*, 40 Br. 29, 31 (Bank, N.D. Ga. 1984) (J. Norton) (citation omitted). In *Greater Atlanta* the court ruled that a "state court receivership cannot operate to deny a corporate debtor access to this nation's federal Bankruptcy Courts." *Id.* This is because "the United States Constitution Art. 1, Section 8 and the Supremacy Clause of the Constitution, U.S. Constitution Art. 6, Cl.2, dictate that bankruptcy proceedings supersede pending state proceedings." *Jordan v. Independent Energy Corp.*, 446 F.Supp. 516, 525 n.14 (N.D. Tex. 1978) (citing *Taylor v. Steinberg*, 293 U.S. 470, 55 S.Ct. 260; *In re Beaver Cotton Mills*, 275 F. 498 (N.D. Ga. 1921)).

Moreover, it has been stated that the "exclusivity of a receiver's title to all assets of the debtor under state law is irrelevant to the determination whether that debtor may file for bankruptcy relief." *In re Jones*, 97 B.R. 901, 902 (Bank, S.D. Oh. 1989) (*citing Cash Currency Exchange, Inc. v. Shine (In re Cash Currency Exchange, Inc.)*, 762 F.2d 542, 553 (7th Cir. 1985). Based on these sound constitutional principles, the ability for the Pimper, as individuals, and the Pimpers, as directors of their corporations, to file for bankruptcy cannot be impeded by the Receiver's powers. Therefore, the Order is overbroad and unconstitutional.

V. The Receiver, as an officer of the Court, is required to use ordinary care to preserve the assets of the receivership estate.

The Order purports to absolve the receiver and his employees or agents from liability, except in the case of bad faith and recklessness. (*See* Order, p. 6, Section V). The extreme breadth of the Receiver's authority to act with indifference to ordinary care oversteps the Receiver's duty as an officer of the court.

As an officer of the court, a receiver is a fiduciary and held to a high standard of care. *See Northeast Factor & Discount Co. v. Mortgage Incs., Inc.,* 107 Ga. App. 705, 131 S.E.2d 221 (1963). Under Georgia Law, a receiver may be liable in his official capacity for sheer negligence or lack of ordinary care to maintain property with which he was charged to maintain. *See Bucknell v. McConnell,* 142 Ga. App. 567, 568, 236 S.E.2d 546, 548 (Ga. App. 1977). Moreover, the Receiver and his agents also may be personally liable for negligent acts outside the scope of the receivership. *Id.*

Because the Receiver is an officer of the court and fiduciary, he has an obligation to maintain and preserve the receivership assets with ordinary care. The Order as it is written is overbroad and unconstitutional.

VI. The purported freeze of all Defendants' after-acquired property violates Defendants' constitutional rights.

The Civil RICO Act subjects all property acquired by means of the alleged racketeering activity to forfeiture proceedings. O.C.G.A. § 16-14-7. This Order improperly reaches beyond the statutory authority and purports to freeze all property of the Defendants, including all after-acquired property from any source, even without regard to any alleged connection to the alleged wrongdoing. The Georgia RICO Act does not authorize the seizure of money and property that is not related to the alleged racketeering activities. O.C.G.A. § 16-14-7(a). Yet, under the Order, even money the Defendants could earn from another job to support their family would be subject to the receivership. (*See* Order, subsection D. of Section VIII).

This aspect of the Order violates the Defendants' constitutional rights. "Fundamental constitutional rights are those that are recognized as having a value so essential to individual liberty in our society that their infringement merits careful scrutiny by the courts." *Ambles v. State,* 259 Ga. 406, 408, 383 S.E.2d 555, 557-58 (1989). Even under forfeiture proceedings pursuant to RICO, Defendants still have a right to earn, use, hold and enjoy property that is not the subject of the racketeering activities. That is, "[the] Constitutional right of property is the right to use and enjoy or dispose of property in lawful manner and for lawful purposes." *Barker v. State,* 56 Ga.App. 705193 [sic] N.E. 605 (1937). Accordingly, the portion of the Order regarding the purported Asset Freeze is overbroad and unconstitutional.

VII. The Complaint and Motion are defective and should be dismissed and the Order vacated.

The Complaint and Motion seek equitable remedies, and both (1) fail even to allege that the State does not have an adequate remedy at law; (2) fail to allege that immediate and irreparable injury will occur if the harsh remedies are not granted; (3) fail to allege that the State has fulfilled the condition precedent of executing a proper bond, as required by O.C.G.A. §16-14-6(b); (4) fail to include a sworn certification by counsel pursuant to O.C.G.A. §9-11-65(b)(1) and (2); and (5) show that the remedies sought, and the scope thereof, are excessive and would operate oppressively against the Defendants. Moreover, the verification is not a direct and proper verification as required. *See* O.C.G.A. §9-10-110. The Complaint is so defective that it should be dismissed and the Order dissolved.

CONCLUSION

The numerous deficiencies and errors referenced above are not merely harmless omissions or technicalities. They deny the essence of due process and the protection of individual liberty which are guaranteed by the Georgia and United States constitutions.

The Order issued at 2:35 p.m. on January 29, 2001, after an *ex parte* hearing, should be declared void and dissolved immediately and, if [sic] is respectfully requested that the relief requested in the accompanying motion be ordered, and that the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 7th day of February, 2001.

BRINSON, ASKEW, BERRY, SEIGLER
RICHARDSON & DAVIS, LLP

BY: /s/ J. Anderson Davis
ROBERT M. BRINSON
Georgia Bar No.: 182900
C. KING ASKEW
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J. ANDERSON DAVIS
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ALSTON & BIRD LLP

BY: Theodore J. Sawicki
THEODORE J. SAWICKI
Georgia Bar No.: 627851
JOHN H. GOSELIN, II
Georgia Bar No.: 302917

ATTORNEYS FOR DEFENDANTS DAVID L. PIMPER and AMY F. PIMPER

1201 West Peachtree Street
Atlanta, GA 30309-3424
(Phone - 404-881-7000)
(Fax - 404-881-7777)

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the **Memorandum in Support of Defendants' Motion to Dissolve Order Appointing Receiver And Granting Temporary Restraining Order** upon all counsel of record via hand delivery, addressed as follows:

Andrew J. Ekonomou, Esquire
Michael G. Lambros, Esquire
Ekonomou, Atkinson & Lambros
450 The Hurt Building
50 Hurt Plaza, SE
Atlanta, GA 30303

David S. McLaughlin, Esquire
Deputy Assistant Attorney General
State of Georgia
Department of Law
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

Lewis E. Hassett, Esquire
Morris, Manning & Martin, L.L.C.
1600 Atlanta Financial Center
3343 Peachtree Road, N.E.
Atlanta, GA 30326

Tami P. Colston, Esquire
Office of the District Attorney
Rome Judicial Circuit
3 Government Plaza, Suite 302
Rome, GA 30161

This 7th day of February, 2001.

/s/ Theodore J. Sawicki
Attorney for Defendants

IN THE SUPERIOR COURT
FOR THE COUNTY OF FLOYD
STATE OF GEORGIA

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney for the Rome Judicial Circuit,	/	CIVIL ACTION
Plaintiff,	/	FILE NO: 01-CV-2158-3
vs.	/	
DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD.,	/	

NOTICE TO APPEAR FOR TESTIMONY AND NOTICE TO PRODUCE

To: Wall Street Creations LTD.
% Andy Davis
Brinson, Askew, Berry . . .
615 West First Street
Post Office Box 5513
Rome, Georgia 30161

Andrew Ekonomou
450 The Hurt Building
50 Hurt Plaza SE
Atlanta, Georgia 30303

Comes now the State of Georgia, Plaintiff in the above styled action and requires Defendant, Wall Street Creations, LTD. (hereinafter referred to as "Defendant") to designate representative(s) of the Company to testify in the Superior Court of Floyd County with respect to the above styled action.

Pursuant to O.C.G.A. Sec. 9-11-30(b)(6) Plaintiff requests that Defendant identify and make available for testimony in Judge Robert Walther's Courtroom in the Floyd County Courthouse, #3 Government Plaza, Rome, Georgia at 1:00 p.m. the employees and or agents most familiar with the following:

1. The manner in which charge cards were charged for customer orders during the month of December, 2000;
2. The manner in which credits were issued to charge cards for merchandise returned by clients;
3. The financial records and books which show the sales of Defendant for the past two years;
4. The current financial condition of the company including but not limited to the debts to the vendors;
5. The policies of Defendant regarding returns on merchandise and representations made to the customers;

Plaintiff requests that the documents identified below be produced for inspection and copying at the time of the hearing.

1. Charge card credit forms for the past year;
2. Merchandise returns for the past year;
3. Charges placed on charge cards during the month of December, 2000;
4. Books and records showing what vendors are owed, the amounts, and the dates of those invoices;

5. The Airborne Express manifest showing shipment and receipt of customer orders;

This 13th day of February, 2001

Respectfully Submitted

/s/ Tami Colston
Tami Colston
District Attorney

Floyd County Courthouse
#3 Government Plaza
Suite 302
Rome, Georgia 30161

706-291-5210
Fax: 706-291-5163

IN THE SUPERIOR COURT
FOR THE COUNTY OF FLOYD
STATE OF GEORGIA

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney for the Rome Judicial Circuit,	/	CIVIL ACTION
Plaintiff,	/	FILE NO: 01-CV-2158-3
vs.	/	
DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD.,	/	

NOTICE TO APPEAR FOR TESTIMONY AND NOTICE TO PRODUCE

To: D.L. Pimper Group Inc.
% Andy Davis
Brinson, Askew, Berry . . .
615 West First Street
Post Office Box 5513
Rome, Georgia 30161

Andrew Ekonomou
450 The Hurt Building
50 Hurt Plaza SE
Atlanta, Georgia 30303

Comes now the State of Georgia, Plaintiff in the above styled action and requires Defendant, D.L. Pimper Group, Inc. (hereinafter referred to as "Defendant") to designate representative(s) of the Company to testify in the Superior Court of Floyd County with respect to the above styled action.

Pursuant to O.C.G.A. Sec. 9-11-30(b)(6) Plaintiff requests that Defendant identify and make available for testimony in Judge Robert Walther's Courtroom in the Floyd County Courthouse, #3 Government Plaza, Rome, Georgia at 1:00 p.m. the employees and or agents most familiar with the following:

1. The operation of D.L. Pimper Group Inc.
2. The operation of the Asset Allocation Program from its inception until January 2000;
3. The operation of the Asset Allocation Program from January 2000 to the present;
4. The representations made to prospective clients of the Asset Allocation Program and how the portfolios of each asset allocation client were managed;
5. Any and all payments from D.L. Pimper to Royal Alliance including but not limited to fees and commissions or any other payment made by D.L. Pimper Group or Dave Pimper personally.
6. Any and all agreements, whether written or oral between Royal Alliance and D.L. Pimper regarding any payments from D.L. Pimper to Royal Alliance.
7. Any and all payments from Royal Alliance to D.L. Pimper or David Pimper personally including but not limited to fees and commissions or any other payments made by Royal Alliance;
8. The operation of D.L. Pimper Group Inc, to the extent that they will be able to identify all persons who have worked with the

Asset Allocation Program, has handled any finances for D.L. Pimper Group or is familiar with the supervision of the transactions of the brokers during the time period between 1992 to the present.

9. The suspension and fine of D.L. Pimper Group by Royal Alliance in 2000;

10. The period of time that Amy Pimper held the position of managing broker and any authorization for her name to be signed to documents by others;

11. The identity of person or persons having knowledge of all statistical and mathematical tools developed for quantifying risk and reward in investment portfolios;

12. The identity of person or persons having knowledge of:

    1. Elements used in evaluating investment portfolios including but not limited to:

        a. Average returns;

        b. Average Variations

        c. Sharp ratios

        d. Correlation coefficients

13. The identity of the person or persons having knowledge of services provided to asset allocation clients as that compares with the description of services on page 15 of the asset allocation flip chart.

14. How investment decisions were made for asset allocation clients;

15. Information relating to an advertisement in the Rome High School Sports Poster identifying D.L. Pimper as a "Registered Investment Adviser."

16. Information as to D.L. Pimper's status as a "Registered Investment Advisor."

Plaintiff requests that the documents identified below be produced for inspection and copying at the time of the hearing.

1. Investment Planning Agreement Form
    a. All forms routinely presented to new asset allocation clients for signature;
        1. Limited Power of Attorney
        2. Written Authorization providing discretionary investment authority over a client's assets;
2. All marketing media used to promote the business of D.L. Pimper Group;
    a. Asset Allocation Flip Chart
    b. Cable Television Ads
    c. Radio Spot Advertisements
    d. Internet Web Site
    e. Local Publication advertisements
    f. Area high school sports posters (Rome High July 1999)
    g. Historic Rome Business Association brochure (8/27/99)
3. Evidence documenting the statements made in the Asset Allocation Flip Chart showing

that the Asset Allocation Plan was the choice of more than 1000 investors;

4. Any software and software manuals that are used to provide the Asset Allocation Service;
5. Documentation of
    1. Statistical and Mathematical tools
    2. The four key elements of evaluating investment portfolios (average returns, average variations, sharp ratios, correlation coefficients)
6. Documentation used to demonstrate services actually provided
7. Research files kept in the ordinary course of business
8. Worksheets or other documents utilized in the analysis of technical and fundamental aspects of the securities market as it relates to allocating client portfolios;
9. Any documents that show D.L. Pimper's status as a "Registered Investment Advisor."
10. Correspondence to D.L. Pimper Group's clients identifying D.L. Pimper as a "Registered Investment Advisor."
11. Policies and procedures established to prevent the misuse of material non-public information by Investment Advisors
12. Policies and Procedures established to ensure compliance with the "Investment Advisor's Act."
13. N.A.V. report for each year for the previous six years;

14. The original SEC letter received by D.L. Pimper Group that was dated January of 2000;

15. All material provided to examiners for on site examination conducted pursuant to Section 204 of the Investment Advisor's Act of 1940 resulting in the letter to Mr. D.L. Pimper from Francis P. McGing, Assistant District Administrator by Diane S. Eckert, Chief Branch of Investment Company and Investment advisor examinations, Securities and Exchange Commission Dated January 19, 2000.

16. Any response to the SEC letter referred to in number 7 above, including any drafts of the letter, consent orders or drafts of consent orders;

17. Any Correspondence between Royal Alliance and D.L. Pimper regarding the SEC investigation;

This 13th day of February, 2001

Respectfully Submitted

/s/ Tami Colston
Tami Colston
District Attorney

Floyd County Courthouse
#3 Government Plaza
Suite 302
Rome, Georgia 30161

706-291-5210
Fax: 706-291-5163

IN THE SUPERIOR COURT
FOR THE COUNTY OF FLOYD
STATE OF GEORGIA

STATE OF GEORGIA, ex rel. /
TAMI P. COLSTON, District /
Attorney for the Rome Judicial /
Circuit, / CIVIL ACTION
/
Plaintiff,
/ FILE NO:
vs. / 01-CV-2158-3
/
DAVID L. PIMPER, /
AMY F. PIMPER, D.L. PIMPER /
GROUP, INC. and WALL /
STREET CREATIONS, LTD., /
Defendants. /
/

CERTIFICATE OF SERVICE

This shall certify that I have this date served a true and correct copy of the THE NOTICE TO APPEAR FOR TESTIMONY AND PRODUCE DOCUMENTS TO WALL STREET CREATIONS AND D.L. PIMPER GROUP" by hand delivery to

Mr. King Askew
P.O. Box 5513
Rome, Georgia 30161

Mr. Lewis Hassett
Morris, Manning & Martin
1600 Atlanta Financial Center
3343 Peachtree Road NE
Atlanta, Georgia 30326

Mr. Andrew Ekonomou
450 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

S. David Smith
Smith, Price & Wright
309 East Second Ave.
Rome, Georgia 30162

This 13thnd [sic] day of February, 2001

/s/ Tami Colston
Tambra P. Colston
Ga. Bar #179315
District Attorney

3 Government Plaza
Suite 302
Rome, Georgia 30161
706-291-5210

IN THE SUPERIOR COURT FOR
THE COUNTY OF FLOYD
STATE OF GEORGIA

**STATE OF GEORGIA, ex rel.
TAMI P. COLSTON,
District Attorney
For the Rome Judicial Circuit,**

Plaintiffs,

vs.

DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD.,

Defendants.

**CIVIL ACTION FILE
NO.:
01-CV-21058-3**

NOTICE OF APPEAL

Notice is hereby given that Defendants named in the above-styled action, hereby appeal to the Supreme Court of Georgia from the trial court's adjudication of February 6, 2001 denying the Defendants' Motion To Dissolve Order Appointing Receiver and Granting Temporary Restraining Order, and its Order entered February 19, 2001 denying Defendants' said Motion.

The Clerk will please send the entire record and all transcripts omitting the following from the record on appeal:

(1) Motion of First Floyd Bank to Intervene;

(2) Brief in Support of Motion of First Floyd Bank to Intervene;

(3) Motion for Turnover of Cash Collateral, to Modify Order Appointing Receiver, for an Accounting and Other Relief;

(4) Memorandum in Support of Motion for Turnover of Cash Collateral, to Modify Order Appointing Receiver, for an Accounting and Other Relief;

(5) Affidavit of Ronald J. Wallace;

(6) Motion for State Mutual Insurance Company to Intervene;

(7) Affidavit of Brooke Callaway;

(8) Motion of Regions Bank of Rome to Intervene;

(9) Motion for Turnover of Identifiable Cash Proceeds, . . . Regions Bank of Rome;

(10) Brief in Support of Motion for Turnover and Other Relief;

(11) Motion for Emergency Hearing and to Modify or Vacate Interim Consent Order, filed by First Floyd Bank;

(12) Memorandum in Support of Motion for Emergency Hearing and to Modify or Vacate Interim Consent Order, filed by First Floyd Bank; and

(13) Motion for Emergency Hearing on Motion for Intervention and Turnover of Identifiable Cash Proceeds to Prevent Irreparable Harm.

A transcript of evidence and proceedings will be filed for inclusion in the record on appeal. The Supreme Court, rather than the Court of Appeals, has jurisdiction over this case on appeal pursuant to Art. 6, § 6, ¶ 3 of the Constitution of the State of Georgia.

This 19th day of February, 2001.

BRINSON, ASKEW,
BERRY, SEIGLER,
RICHARDSON &
DAVIS, LLP

/s/ Robert M. Brinson
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the **Notice Of Appeal** upon all counsel of record by placing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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EDWARD HINE, JR., P.C.
Post Office Box 5511
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This 19th day of February, 2001.

/s/ J. Anderson Davis
J. ANDERSON DAVIS

IN THE SUPERIOR COURT FOR THE COUNTY OF FLOYD STATE OF GEORGIA

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney for the Rome Judicial Circuit,	/	**CIVIL ACTION**
Plaintiff,	/	**FILE NO: 01-CV-21058-3**
vs.	/	
DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD.,	/	
Defendants.	/	

DISMISSAL WITHOUT PREJUDICE

(Filed Feb. 26, 2001)

Comes now Plaintiff in the above styled action and dismisses the case against David L. Pimper and Amy F. Pimper as individuals without prejudice.

This 26th day of February, 2001

/s/ Tami Colston
Tami Pannell Colston
Ga. Bar 179315
District Attorney

#3 Government Plaza
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Rome, Georgia 30161
706-291-5210
Fax: 291-5163

CERTIFICATE OF SERVICE

This shall certify that I have this date served a true and correct copy of the Dismissal without prejudice of defendants David L. Pimper and Amy F. Pimper on counsel of record by placing same in the United States Mail with sufficient postage affixed thereto and addressed to the following:

Mr. King Askew
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This 26th day of February, 2001

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IN THE SUPERIOR COURT FOR
THE COUNTY OF FLOYD
STATE OF GEORGIA

STATE OF GEORGIA, ex rel. /
TAMI P. COLSTON, District /
Attorney for the Rome Judicial /
Circuit, / **CIVIL ACTION**
/
Plaintiff, / **FILE NO:**
vs. / **01-CV-21058-3**
/
DAVID L. PIMPER, AMY F. /
PIMPER, D.L. PIMPER GROUP, /
INC. and WALL STREET /
CREATIONS, LTD., /
/
Defendants. /

DISMISSAL WITHOUT PREJUDICE

(Filed Feb. 27, 2001)

COMES NOW Plaintiff, the State of Georgia, which, having been informed that defendant D.L. Pimper Group, Inc. is the subject of an involuntary Chapter 7 bankruptcy proceeding in the Northern District of Georgia, Case No. 01-50332, and that defendant Wall Street Creations, Ltd., has filed a voluntary Chapter 7 bankruptcy proceeding in the Northern District of Georgia, Case No. 01-50344 and hereby dismisses the above styled action without prejudice.

This 27th day of February, 2001

/s/ Tami Pannell Colston
Tami Pannell Colston
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District Attorney

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Fax: 291-5163

APPROVED:

/s/ Robert Walther
Judge Robert Walther, Chief Judge
Rome Judicial Circuit
Floyd Superior Court

IN THE SUPREME COURT OF THE STATE OF GEORGIA

STATE OF GEORGIA, ex rel. TAMI P. COLSTON, District Attorney For the Rome Judicial Circuit,	:	**CASE NO.: SO1A0946**
Appellees/Plaintiffs,	:	
vs.	:	
DAVID L. PIMPER, AMY F. PIMPER, D. L. PIMPER GROUP, INC. and WALL STREET CREATIONS, LTD.,	:	
Appellants/Defendants.	:	

Appellants David L. Pimper, Amy F. Pimper, D. L. Pimper Group, Inc. and Wall Street Creations, Ltd. (the "Pimpers") appeal from the lower court's entry of the order Appointing Receiver and Granting Temporary Restraining Order, entered January 29, 2001 (the "Receivership Order"), and the lower court's Order denying the Pimpers' Motion to Dissolve Order Appointing Receiver and Granting Temporary Restraining Order, filed February 19, 2001.

ENUMERATIONS OF ERROR

I. The court below erred in entering, and then refusing to dissolve, the *ex parte* Receivership Order, because the Receivership Order was obtained without complying with the mandatory and jurisdictional requirements of O.C.G.A. §§ 16-14-6(b) and 9-11-65(b).

II. The court below erred in entering, and then refusing to dissolve, the *ex parte* Receivership Order, because the State did not demonstrate, with competent evidence, immediate and present necessity or clear and urgent need for the *ex parte* appointment of a receiver.

III. The court below erred in entering, and then refusing to dissolve, the *ex parte* Receivership Order, because the unrecorded *ex parte* hearing that led to the entry of the Receivership Order, and the terms of the Order, violated the Pimpers' constitutional rights.

Respectfully submitted this 12th Day of April, 2001.

/s/ Theodore J. Sawicki
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JOHN H. GOSELIN II
Georgia Bar No. 302917
ATTORNEYS FOR APPELLANTS DAVID L. PIMPER, AMY F. PIMPER, D.L. PIMPER GROUP, INC. AND WALL STREET CREATIONS, LTD.

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MARK M.J. WEB
Georgia Bar No. 744639

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am counsel for Defendants in the above matter and that I have served the above and foregoing upon all parties herein by mailing a copy of the same in a properly addressed envelope with sufficient postage affixed thereon to the following:

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This 12th day of April, 2001.

/s/ Theodore J. Sawicki
THEODORE J. SAWICKI

O.C.G.A. Stat. 9-11-65 Injunctions and restraining orders.

(a) Interlocutory injunction.

(1) Notice. No interlocutory injunction shall be issued without notice to the adverse party.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for an interlocutory injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for an interlocutory injunction which would be admissible upon the trial on the merits shall become a part of the record on the trial and need not be repeated upon the trial. This paragraph shall be construed and applied so as to save any rights of the parties which they may have to trial by jury.

(b) Temporary restraining order; when granted without notice; duration; hearing; application to dissolve or modify. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) The applicant's attorney certifies to the court, in writing, the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required.

Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, and shall expire by its terms within such time after entry, not to exceed 30 days, as the court fixes, unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the motion for an interlocutory injunction shall be set down for hearing at the earliest possible time and shall take precedence over all matters except older matters of the same character; when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for an interlocutory injunction; and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification; and in that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) Security. As a prerequisite to the issuance of a restraining order or an interlocutory injunction, the court may require the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been enjoined or restrained wrongfully. A surety upon a bond or undertaking under this Code section submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) Form and scope of injunction or restraining order. Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order by personal service or otherwise.

(e) When applicable. This Code section is not applicable to actions for divorce, alimony, separate maintenance, or custody of children. In such actions, the court may make prohibitive or mandatory orders, with or without notice or bond, and upon such terms and conditions as the court may deem just.